No. 45476-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

TED SPICE and PLEXUS DEVELOPMENT, LLC,

Appellants,

v.

PIERCE COUNTY, a political subdivision, and the CITY OF PUYALLUP, a municipal corporation,

Respondents.

BRIEF OF RESPONDENT CITY OF PUYALLUP

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I. INTRODUCTION AND RELIEF REQUESTED

This litigation needs to end. This lawsuit is over nine years old, has a tortured procedural history, and has been litigated to death. The Appellants (Plaintiffs below) filed this lawsuit[1] on August 29, 2007 – a Land Use Petition Act ("LUPA") Appeal, Complaint for Declaratory Relief, and RCW ch. 64.40 claim for damages. Thereafter, this case has generated over 80 pleadings, briefs, memoranda and declarations totaling more than 7,500 pages, and prompted least 14 in-Court hearings or motions wherein Plaintiffs asserted, and re-asserted, the same arguments. In this appeal, Appellants have filed five notices of appeal challenging eight orders and three judgments, making innumerable motion and brief extension requests, and dragging this appeal out for over three years.

Throughout these innumerable Trial Court pleadings and this appeal, Plaintiffs/Appellants have repeated, recycled and in many cases cut-and-pasted from prior documents to reassert the exact same arguments, same claims, same theories and utilizing the same authority. Furthermore, they have regularly manipulated process and rules to obtain additional time or attempt to distort the record below. Despite these efforts, Appellants have lost at every turn and had attorneys' fees imposed against them and CR 11 sanctions imposed against their attorney.

Appellants' recycled claims and arguments lack both factual and legal merit. The Pierce County Trial Court has made thoughtful, carefully

[1] These same Appellants filed a previous, nearly identical lawsuit in 2006, making many of the same arguments and claims – but without the ch. 64.40 damage claim. Appellants were sanctioned in that case, too, by the Court of Appeals. *See, Spice v. Pierce County*, 149 Wn. App. 461, 204 P.3d 254 (2009).

crafted and well-supported decisions, and all of those decisions, orders and judgments should be affirmed *in toto*. Consequently, for reasons of judicial economy, costs to the respondents, and to stop this abuse of process, this litigation must end.

II. COUNTER-STATEMENT OF THE CASE

A. Parties, Property and Subject of Appellants' Claims

This action originally began on August 29, 2007, when the Appellants filed a LUPA Petition and Complaint for declaratory judgment and damages under ch. 64.40 RCW ("Complaint"). CP 1-28. In the Complaint, three Plaintiffs are identified: Ted Spice; Plexus Development, LLC; and Doris E. Mathews. Ms. Mathews is specifically identified in the Complaint as "the [100%] fee title property owner." CP 2. The Appellants' attorney was (and remains) Carolyn A. Lake. The City of Puyallup and Pierce County are identified as "respondents." The property at issue in the case is identified as 11003 – 58th St. Ct. East ("Property") and is outside of the Puyallup City limits, in unincorporated Pierce County. CP 1-28.

As discussed *infra,* two key points are: First that property owner Doris Mathews died in December 2009, and the deceased Ms. Mathews has never been removed as a named party to this litigation; nor has Plaintiffs'/Appellants' attorney Lake ever informed either the trial court or this court, that she no longer represents Ms. Mathews (or her estate). Second, after this litigation was initiated and after Ms. Mathews died, and following a hotly contested trial between Ted Spice and Mathews' Estate in

2012 which involved the subject property, the Pierce County Superior Court awarded 75% ownership of the Property to Ms. Mathews' Estate and 25% ownership to Spice. CP 3668, 3671. Attorney Lake has never amended the complaint to reflect this post-filing ownership adjustment, but she continues to represent Ms. Mathew's interests.

Appellants claim they want to build two large office warehouse buildings on the Property. They claim to want water service (or change in service) from the City who has the discretion to provide water service outside of its boundaries in this general area upon application and approval by the Puyallup City Council. However, Appellants have never submitted a written application for water service (or change of service), nor have they paid an application fee to the City, submitted to an approval review before Puyallup's City Council, submitted engineering plans, asked for a pre-application conference, or sought review before Puyallup's Hearing Examiner, all as required by City Code ("PMC"), ch. 14.22.[2] CP1518-1519, ¶¶ 6 – 8, 10; CP 1716, 1718¶¶ 5, 8, CP 1724, ¶ 21.

B. <u>Water service dispute</u>

When Appellants filed their 2006 and 2007 (current) LUPA Petitions, in addition to the aforementioned requirements, the City required owners of property outside the City limits, to annex their property into the City as a pre-condition of approval of a water service connection or change of water service.[3] This annexation requirement, which forms the basis for

[2] A copy of PMC ch. 14.22 which was in effect from 2004-2011 is attached as **Appendix A**.
[3] The requirement that out-of-City applicants for City water service agree to annex their property into the City was codified at [<u>former</u>] PMC 14.22.020(5), which provided as

both of Appellants' LUPA lawsuits (see discussion, below), and which underlies their ch. 64.40 damage claim, was in effect from June, 2004 until July 18, 2011 and is no longer in effect. This requirement was eliminated by the City Council in 2011. CP 1517-1518.

Thus, Appellants' former (2006) and current (2007) LUPA Petitions, and their claims for City of Puyallup water service were – and remain – governed by the requirements in PMC Ch. 14.22, with the notable exception that the annexation requirement no longer applies. *Id.*

1. 2006 LUPA

a. 2005 Hearing before Pierce County Hearing Examiner. In the Spring of 2005, Appellants obtained a hearing before the Pierce County Hearing Examiner, requesting that he require the City to provide unconditioned water service to them, and/or to revise Puyallup's water service area to remove their property from the service area, and allow them to proceed with a plan to develop their own well water system. CP 1720. On May 19, 2005, the Examiner removed Appellants' land from Puyallup's water service area, and allowed them to develop a Group A well water system. The Hearing Examiner did not require the City of Puyallup to provide water service to them. Appellants' argument was, and continues to be, that the Hearing Examiner could require the City to provide water service to their land without conditions or having to annex their property to the City (even though the City Code at that time clearly required annexation). *Id.*; CP 1746-1773;

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follows: "The applicant shall agree to annex to the City of Puyallup at such time the City desires to annex the property for which water or sewer service has been extended." CP 1517, ¶¶ 3 – 5; CP 1525; Appendix A.

CP 1-28.

b. 2006 Reconsideration Hearing Before Pierce County Examiner. Appellants then asked the Hearing Examiner to reconsider his decision and require that the City be required to provide water service to their land and to issue an unconditioned water service availability letter. The Examiner responded to the reconsideration request on January 12, 2006, but he did not issue the mandate. Rather, the Examiner allowed Appellants to obtain water service from any other available (non-City) source. The Examiner ruled that if "either the Group A well water system or any other water source [was] not feasible for [Petitioners], then [Petitioners could] request from the Hearing Examiner that the City of Puyallup be required to provide water to the site." CP 1721, ¶ 14, CP 1746-1773, *generally*.

c. 2006 LUPA Petition (First LUPA Lawsuit). In February 2006, Appellants Spice and Plexus filed their first LUPA Petition seeking judicial review of the May 19, 2005 and January 12, 2006 Hearing Examiner decisions. In their 2006 LUPA, Cause No. 06-2-04949-2, they asked the Pierce County Superior Court to "require that the City of Puyallup abide by its duty to provide water service to Petitioner[s]...". CP 1746.

In their 2006 LUPA Petition, Appellants noted that they were seeking more relief than the Hearing Examiner had provided – a requirement that the City provide unconditioned water service. They claimed that the Examiner erred by failing to require the City of Puyallup to provide unconditioned water service to Petitioners, and asked the court

to "remand to the Deputy Hearing Examiner with direction to require the City of Puyallup to carry out its duty to provide water service to Plexus...". CP 1721, ¶¶ 15 – 16.

d. Dismissal with Prejudice of 2006 LUPA Petition.

In November of 2006, after failing to prosecute their first LUPA petition for nearly 10 months, Appellants strangely withdrew their February 2006 LUPA. CP 1722. *See, also, Spice v. Pierce County*, 149 Wn. App. 461, 204 P.3d 254 (2009). On November 22, 2006, Respondent Pierce County asked Pierce County Superior Court to dismiss the 2006 LUPA Petition with prejudice. A hearing on the motion occurred on December 8, 2006. Only the attorneys for the City and Pierce County appeared at the hearing, and the court granted the motion and dismissed the 2006 Petition with prejudice. CP 1722, and *Spice,* 149 Wn. App. at 465, 467. Appellants appealed and Division II of the Court of Appeals upheld the dismissal, held that the appeal was frivolous, and imposed sanctions.[4] *Id.* at 468. Appellants thereafter sought discretionary review to the State Supreme Court, and on a Stipulated Motion to Dismiss Review the Supreme Court on June 30, 2010 dismissed the review. CP 1722, ¶ 17.

2. <u>2007 LUPA/Declaratory/Ch. 64.40 (current action)</u>

a. 2007 Hearing before Pierce County Examiner.

[4] In this earlier Spice appeal, this Court held: "Moreover, because Spice and Plexus voluntarily withdrew their LUPA Petition from Superior Court, there is no relief we can provide and the issues they raise are not properly before us. For these reasons, we further hold that their appeal before our Court is frivolous and dismiss it. In addition, we grant attorney fees under RAP 18.1 and 18.9(a) to the County and to the City as they request in their respective briefs."

Undaunted by the dismissal of their 2006 LUPA petition, Appellants in April of 2007 again asked the Pierce County Hearing Examiner to issue an Order compelling the City to provide water service to their property. CP 1722. Pierce County and the City contended that the Examiner did not have authority to compel the City of Puyallup to provide water service. The Hearing Examiner agreed that he did not have that authority, and on August 7, 2007 denied Appellants' request to compel the City to provide water service. In his decision, the Examiner ruled in pertinent part:

> ***The issue now is whether compelling a City to provide water services is even allowable under the Pierce County Code (PCC).*** The Hearing Examiner's allowable actions have to be enumerated within the Pierce County Code. PCC § 19D.140.090(H) states as follows: . . .
>
> . . .
>
> The issue is whether the code section allowing 'imposition of reasonable conditions' allows the Hearing Examiner to require a particular purveyor to provide service. ... ***[T]he Examiner believes that the 'imposition of reasonable conditions' does not include the right to require the City of Puyallup to provide water service to this site.***
>
> . . .
>
> ***The request to compel the City of Puyallup to provide water service to this site is denied, because the Hearing Examiner does not believe he has the power to order that remedy.*** . . .

CP 1812-1813. This order forms the basis for the "water dispute" component of Appellants' current lawsuit.

b. 2007 LUPA Petition. On August 29, 2007, Appellants filed a second LUPA Petition, which is the present action ("2007 LUPA"). CP 1-28. The substance of the water service claims in this 2007 LUPA

Petition are nearly identical to Appellants' 2006 LUPA Petition. In this current action, they contend that the Hearing Examiner erred in his August 7, 2007 Decision by failing to "firmly [require] Puyallup to affirmatively meet its duty to provide water service to Petitioner[s]," and that the Examiner erred by failing to "[require] the City of Puyallup to provide water service." Appellants asked for essentially the same relief as in their 2006 LUPA – namely, that the Court "[r]emand to the Deputy Hearing Examiner with direction to require the City of Puyallup to carry out its duty to provide water service to Petitioners." In addition, in this action, the Appellants included claims for declaratory relief and for damages under ch. 64.40. CP 10-11.

c. The Court's September 12, 2008 Order. After reviewing the record before the Examiner and his August 7, 2007 Decision, and receiving briefing and argument from the parties, Judge Chushcoff entered his September 12, 2008 Order, which was substantially in favor of the County and the City, ruling:

> 1. ***The Court affirms the August 7, 2007 decision of the Pierce County Hearing Examiner, to wit: the Pierce County Hearing Examiner does not have the power to compel the City of Puyallup to provide water service to Petitioners' property.*** However, the Hearing Examiner does have the power to determine what reasonable pre-conditions the City of Puyallup may place upon the furnishing of water (Puyallup concedes that Petitioners are within its water service area) including whether Puyallup may require annexation of Petitioners' real property into the City as a pre-condition of providing commercial water service to Petitioners and/or to processing an appropriate application for water service or changes in water service (whether commercial or

residential) in accord with pertinent Puyallup Municipal Code.

2. ***This matter is remanded to the Pierce County Hearing Examiner for proceedings consistent with this ruling.***
3. ***If Petitioners do continue to pursue a change in their existing water service from the City of Puyallup, they have to comply with the application process set forth in pertinent Puyallup Municipal Code, except insofar as the Code is inconsistent with this order.***
4. This Department retains jurisdiction over this matter in the event of issues that bring this matter before the Superior Court.
5. ***With the entry of this order as to the LUPA matter, the declaratory judgment action is moot.***

CP 667-668 (emphasis added). Appellants never took any action on Order rulings 1-3 since this Order was issued over eight years ago.

d. Then, nothing happened for five (5) years. Appellants neither returned to the hearing examiner, appealed the LUPA decision, made application to the City for water service, nor prosecuted the 64.40 damages claim. During this period, Doris Mathews, died but neither Appellants nor their attorney, Ms. Lake, told the trial court or the respondents. Furthermore, during this period, Pierce County rescinded its hearing examiner's jurisdiction to hear such disputes.

C. First Summary Judgment Dismissal of Case, Ch. 64.40 fees and First Judgment

On March 29, 2013, the City filed its (first) Motion for Summary Judgment, seeking dismissal of the case in its entirety. In response, Plaintiffs entered a stipulated dismissal of Pierce County because the LUPA

portion of the litigation had been "fully adjudicated."[5] This Motion was granted on June 21, 2013 after hearing argument by the attorneys for the parties. The Court also ordered that the City was entitled to attorneys' fees under RCW ch. 64.40, in an amount to be determined at a later hearing. CP 1141-1144. The trial court held as follows in its Order Granting summary judgment:

> (1) there had been no compliance with the Court's September 12, 2008 Order and no remand to the Hearing Examiner; (2) Petitioner's signed a stipulation acknowledging that the LUPA matter 'had been fully adjudicated'; (3) the Pierce County Hearing Examiner's August 7, 2007 Decision is final and binding; (4) Petitioners have not complied with the City of Puyallup's water service requirements, and never submitted an application for water service or change of water service to the City; and (5) Petitioners cannot meet various predicate requirements for a cause of action under RCW ch. 64.40 and, therefore, Petitioners' RCW ch. 64.40 damage claim is not ripe and Petitioners lack standing to pursue that claim.

CP 1143. Reconsideration of this Order was denied by the court on September 10, 2013. CP 1365. On October 10, 2013, Appellants filed their first Notice of Appeal. CP 1369-1381.

The City's Motion for Reasonable Attorneys' Fees and Costs was granted and fees in the amount of $132,790.65 were assessed against Plaintiffs Ted Spice, Plexus Development, LLC and Doris E. Mathews, "jointly and severally." CP 2574-2590; CP 2591-2592. Counsel for Appellants allowed this Order and Judgment to be entered against their client, Doris Mathews, even though she had been dead for four years.

[5] CP 1003-1006.

Appellants filed their Second Notice of Appeal after this Order. CP 2593-2613.

D. Property Owner Doris Mathews dies December 8, 2009, with no Substitution of the Estate or P.R. for Ms. Mathews

Ms. Mathews died on December 8, 2009 in Pierce County. At the time of her death she was 81 years old and was widowed. CP 3807. Ms. Mathews' will was admitted to probate on January 8, 2010, and Donna DuBois, her daughter, was appointed as the personal representative ("P.R.") of the Estate of Doris Mathews in Pierce County Superior Court Case No. 10-4-00037-5. *Id.* at ¶ 4. At no time after Ms. Mathews' death did anyone, including Mr. Spice, attorney Carolyn Lake, attorney Stephen Hansen, or any other attorney, or agent for Mr. Spice or Plexus Development LLC, attempt to arrange for a substitution of parties in this case—namely, a substitution of the Estate or the P.R. for the decedent, Doris Mathews. CP 3808, ¶ 7; CP 3810, ¶13.

E. Appellants' Attorneys Provide No Notice to the Trial Court of the Death of Ms. Mathews, and the Court Unknowingly Entered Summary Judgment, Attorneys' Fees Orders, and Final Judgment In Favor Of the City and Against Ms. Mathews

Notwithstanding their failure to advise the trial court or the Defendants of the death of their client and majority property owner, the Appellants and attorney Lake actively litigated their LUPA and damages case in the Pierce County Superior Court, made various motions, filed briefs, presented argument, defended against the City's motion for summary judgment and for attorneys' fees, and allowed a judgment of $132,790.65 to be entered "jointly and severally" against all three Plaintiffs

(Ms. Mathews, Mr. Spice and Plexus Development LLC). CP 3677, ¶ 4; CP 3681-3684, ¶¶ 12-20; CP 3691-3695.

Between December 9, 2009 (the day after Ms. Mathews died), and December 13, 2013 (when final judgment was originally entered in this case and precipitated the First Notice of Appeal), at least seven motions were noted or heard, at least four court hearings were held, and hundreds of pages of briefing and evidentiary materials were submitted to Pierce County Superior Court. *See, id.* Also during this period of time, Appellants' counsel Carolyn Lake filed and served notices of absence/unavailability, transmitted numerous emails to counsel for the City and Pierce County, and actively litigated the case. During this time and activity, attorney Lake never advised the City's attorneys or the trial court that Ms. Mathews, her client and the fee title property owner in the case, had died.[6] *Id.;* CP 3824, ¶¶ 4-5, CP 3826, ¶ 8. Nor did they ever move the trial court to substitute the Estate of Doris E. Mathews.[7]

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[6] At no time before the City filed its original Motion for Summary Judgment (March 29, 2013), its Motion for Presentation of the Summary Judgment Order (June 12, 2013), its Motion for Determination of Attorneys' Fees and Costs (July 1, 2013), its Motion for Entry of Final Judgment (also July 1, 2013) – or any other Court filing or action in the trial court – did the Appellants' attorneys advise the City's attorneys or the trial court (Judges Culpepper and Nevin) that Doris Mathews had died. CP 3685-86, ¶¶ 25-26; CP 3826, ¶¶ 8-9.

[7] Had the City's attorneys known that Ms. Mathews had died during the trial court litigation, they would have refrained from filing any motions against her and from asking the Court to enter a final judgment against Ms. Mathews. Had the City's attorneys known that Ms. Mathews died, they would have asked her legal counsel – Ms. Lake and Mr. Hansen – whether they were going to substitute the Estate for her in order to allow the action to proceed. If they would not have done so, the City would have moved to dismiss this action for failure to join a necessary and indispensable party – the Estate, a fee title owner of the property at issue in this litigation (and appeal). CP 3686, ¶ 28; CP 3827, ¶ 11.

F. City Learns *AFTER* First Appeal is Filed that Ms. Mathews Died in December 2009

On October 10, 2013, Appellants (or some of them) filed their first Notice of Appeal, appealing the trial court's September 12, 2008, LUPA Order, the June 21, 2013, summary judgment Order, and the September 10, 2013, Order on Reconsideration. CP 1369-1381. The caption of this first Notice of Appeal lists Ted Spice, Plexus Development, LLC and Doris E. Mathews as "appellants." *Id.* Weeks later, in preparing the City's Clerk's Papers, the City's attorneys noticed a small footnote on page 1 of this Notice of Appeal, which reads: *"Petitioner before the Trial Court below Doris Mathews is now deceased."* CP 3678, CP 3684, CP 3824-3826. The City's attorneys had no knowledge before seeing this footnote in late October or early November of 2013 that Ms. Mathews had died.[8] *Id.*

About December 30, 2013, the Appellants' attorney Carolyn Lake, filed a "Second" Notice of Appeal, CP 2593-2613, challenging the Trial Court's December 13, 2013, order awarding attorneys' fees to the City and the December 13, 2013, final judgment on the fee award. *Id.* This Second Notice of Appeal also lists in the caption Doris E. Mathews as one of the three appellants, *Id.*; but, unlike the first Notice of Appeal, does not contain any indication that Ms. Mathews had died. *Id.*

In November, 2013, when the City's attorneys began research to determine how Ms. Mathews' death might impact this appeal, and whether

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[8] This footnote and the Notice of Appeal does not indicate anywhere when Ms. Mathews died. In reading this footnote, the misleading implication is Ms. Mathews had just recently (in the last few weeks or so) died ("... Doris Mathews is ***now*** deceased."). CP 3684, ¶ 21 (emphasis added).

it could go forward without the property owner involved, they learned that Ms. Mathews had actually died on December 8, 2009 – over three years before the City's MSJ, the fee award and the final judgment were entered in this case.[9] CP 3678, ¶ 5; CP 3684-3685, ¶¶ 21-24; CP 3824-3825.

G. Appellants' Attorneys Knew, or Should Have Known, Their Client, Doris Mathews Died Years Before the Trial Court Made Dispositive Rulings and Entered Judgment Against Ms. Mathews

Mark DuBois, Ms. Mathews' son-in-law and the husband of the P.R. of the Estate (Donna DuBois), describes in his declaration Mr. Spice's relationship with Ms. Mathews before she died, and the litigation he has been involved in with the Estate. CP 3807-3810 ¶¶ 5-14. Attorney Stephen Hansen also represented Mr. Spice in litigation against the Estate of Doris Mathews – while he was co-counsel with Ms. Lake in this action. *Id.* ¶ 10.

H. The Estate of Doris Mathews Owns 75 Percent of the Subject Property

Pursuant to the jury verdict in the Estate case, No. 10-2-11622-8, and the associated judgment and order of the court, the Estate of Doris Mathews was awarded 75% of the property, and Mr. Spice was awarded the remaining 25% of the subject property. CP 3668, 3671. Ms. Mathews owned 100% of the subject property when this case was filed but her Estate now owns 75% of the property. The Court can take judicial notice that the

[9] Around the same time, a Mark DuBois had made a public records request to the City for documents pertaining to this lawsuit and this appeal. Mr. DuBois subsequently called City Attorney Yamamoto to discuss this lawsuit, and informed him that he was the son-in-law of Doris E. Mathews, and that his wife, Donna, was the personal representative of Ms. Mathews' estate. Subsequently, Mr. DuBois provided various documents regarding Ms. Mathews' death and confirmed that the Estate had never been substituted in this case and did not want anything to do with it. CP 3824-3825, ¶¶ 6-7; CP 3806-3808, ¶¶ 2-7.

appeal of that verdict by Plaintiff Spice has been dismissed by this Court. *See*, Court of Appeals No. 44101-2-II. Appellants have never attempted to amend their Complaint to reflect this fact.

I. The Estate of Doris Mathews does not want to be Involved in this Appeal or the Underlying Trial Court Action, and Believes the Case is Meritless

Neither Mr. Spice, nor Attorneys Lake or Hansen ever approached the Estate or its P.R., Donna DuBois, about substituting the Estate for Ms. Mathews in this case. CP 3619-3620. If they had asked about substituting the Estate for Ms. Mathews, the Estate would have adamantly declined to allow the substitution. *Id.* at ¶ 13. The Estate wants nothing to do with litigation and refuses to be substituted or joined. *Id.* Yet, attorney Lake has never filed a withdrawal of presentation for Ms. Mathews.

J. The Court of Appeals Remands the Case to the Superior Court

After the City's attorneys confirmed the death of Doris Mathews and completed other research and investigation, the City filed a motion with this Court in 2014 to dismiss the first appeal. The basis of this motion was that neither the City nor its legal counsel nor the trial court had been advised by Plaintiffs' counsel that one of the Plaintiffs in this case and the owner of the subject property—Ms. Mathews—had died in 2009, and that due to her death, a necessary and indispensable part was lacking in the appeal. The motion to dismiss the appeal was briefed by the parties, and on June 4, 2014, this Court issued its *Order Remanding Judgments for Further Proceedings,* remanding the case to the trial court holding that "the City appears to be correct that the 2013 judgments are void." CP 3821-3822.

K. In Response to Remand Order, the City Brings Motion to Vacate, Motion for Summary Judgment and Motion for CR 11 Fees and Costs

In response to this Court's June 4, 2014 Remand Order, the City brought a Motion to Vacate all Orders Entered by the Court following the death of Doris Mathews, as well as a new Motion for Summary Judgment for Failure to Join an Indispensable Party and a Motion for CR 11 Fees and Costs due to the wasted expenditure of time, expenses and fees incurred in this matter that arose from their failure to advise the City's attorneys and the Court of the death of Doris Mathews.

The Honorable Jack Nevin of Pierce County Superior Court held three thorough and probing fact-finding hearings (on January 9, 2015, June 5, 2015 and July 20, 2015) regarding the City's Motion to Vacate and Motion for Summary Judgment for failure to Join Indispensable Party; and, after requiring the Personal Representative of the Estate of Doris Mathews to attend, and after hearing from the attorney for the Estate and the attorney for the Estate's Personal Representative, Judge Nevin orally granted both Motions and scheduled a later hearing for the City's CR 11 Motion.

On July 20, 2015, after holding his third fact-finding hearing to comply with this Court's Remand Order, Judge Nevin entered *Findings of Fact and Conclusions of Law, and an Order* granting the City's Motion to Vacate and Motion for Summary Judgment. That Order effectively vacated all previous orders and judgments holding as follows:

> 28. Once Ms. Mathews died December 8, 2009, her then attorneys, Carolyn Lake and—later—associated attorney Stephen Hansen, lost legal ability to do anything for or take any action regarding Ms. Mathews or her interest in the subject property in this litigation. Accordingly, when Ms. Mathews died, the attorney-client relationship between her and her attorneys, Carolyn Lake and Stephen Hansen, ended and those attorneys were without authority to take any action or do anything in the case regarding her claims or her interest in the subject property;
>
> 29. The Estate of Doris Mathews, which currently holds a 75% interest in the subject property, is a necessary and indispensable party to this litigation. The litigation cannot proceed without the Estate in the case, and the Estate refuses to join in the litigation and wants no part of it. Additionally, the Court is without authority to and cannot compel the Estate to be a party to this litigation against its wishes; ***
>
> 30. All decisions, orders and the judgments following Ms. Matthews' death must be vacated ab initio; and, even if this Court could compel the Estate to be a party it would refuse to do so;
>
> 31. Because there is an absence of a necessary and indispensable party to this action—the Estate of Doris E. Mathews which holds a 75% interest in the subject property—there is no legal relief this Court can grant, and no authority to allow this matter to proceed. Accordingly, due to the absence of the Estate as a necessary and indispensable party to this litigation and for the reasons set forth in the City of Puyallup's October 9, 2014 Motion for Summary Judgment, summary judgment is required, and dismissal of this case with prejudice is warranted.

CP 3418-3419. That Order vacated all of the orders and judgments entered against the Plaintiffs following Ms. Mathews' death, and granted summary judgment in favor of the City for Plaintiffs' failure to join an indispensable party (the Estate). Appellants followed this with their third Notice of

Appeal, filed on August 17, 2015. CP 3560-3561.

L. The City Files a Renewed Motion for CR 11 Sanctions and the Trial Court Imposes Sanctions on Attorney Lake

The City subsequently filed a Renewed Motion for CR 11 Sanctions against Spice, Lake, and Hansen, requesting $312,181.86 in sanctions against one or more of them. This request was based on all work done in the case from January of 2010 (one month after Doris Mathews had died, until the motion was filed in July 2015). CP 3577-3612.

The Court heard argument on the motion on September 25, 2015, and then requested additional briefing from both parties on the CR 11 issue. The Court held an additional hearing on December 11, 2015 to announce and explain its decision on the City's CR 11 motion. Judge Nevin then, *sua sponte*, drafted his own order on CR11 sanctions (not following civil rules requiring prevailing party to draft a proposed order). In coming to this decision, Judge Nevin reviewed all of the pleadings starting with those from 2007 (RP December 11, 2015 hearing, at 5:2-5); and also reviewed the case of *Spice v. the Estate of Doris Mathews*. *Id.* at 5:5-7. Additionally, Judge Nevin stated that he consulted colleagues and experts in civil procedure, as well as reviewed nearly 1,000 pages of law review articles regarding the topic and 30 cases. *Id.* at pp. 6-8. The trial court found no CR 11 liability against Spice or attorney Hansen, and imposed no sanctions against them. The Court did find CR 11 liability against attorney Carolyn Lake personally, in the amount of $45,000. The Court held that this was a "reasonable figure given the nature and the extent of this litigation and how far it was allowed

to go before this information [Ms. Mathews' death] was divulged." RP at 30:10-12. The Court's reasoning for not awarding the larger amount the City requested was that much of the work the City engaged in would have had to have been done anyway.[10]

On April 15, 2016, the Court entered Findings of Fact and Conclusions of Law and Order Granting City of Puyallup's CR 11 Sanctions against Attorney Carolyn A. Lake (CP 7460-7479). Sanctions in the amount of $45,000 were entered "which the Court finds to be a fair and reasonable amount given the nature and extent of this litigation and how far it was allowed to proceed before the fact of Ms. Mathews' death was disclosed, for Ms. Lake's failure to make a reasonable inquiry into the death of her client, Ms. Mathews, and as a sanction for deterrence. This amount is a sanction award and not intended as attorneys' fees and costs incurred by the City." *Id.* at 7474. The trial court continued: "Ms. Lake continued to vigorously litigate this case following the death of Plaintiff Mathews without legal authority to do so; and thus filed pleadings that were not well-grounded in fact and without legal effect." *Id.* at 7475.

[10] "Now, to say this matter was zealously litigated by all sides would be the understatement of the century. And throughout this litigation petitioner's [Appellants'] counsel, primarily Ms. Lake, represented Doris Mathews, only she was dead. And throughout this litigation, despite a direct inquiry from this court in hundreds of pages, at least over 100 pages, I still have not heard an explanation of why the court wasn't told that Ms. Mathews was dead. I don't know how many pleadings have been filed in this case, I stopped counting at about 80, but I think certainly 80 pleadings, but every pleading filed in this case until a footnote before the Court of Appeals, the plaintiffs purported to represent Doris Mathews." RP (December 11, 2015) at 20:10-23. *See also*, p. 27.

M. The Trial Court Grants the City's Renewed Motion for Attorneys' Fees and Costs Pursuant to Ch. 64.40 RCW

On that same day also, again *sua sponte,* Judge Nevin drafted and entered his own *Order Granting the City of Puyallup an Award of Reasonable Attorney Fees and Costs Pursuant to RCW Ch. 64.40* (CP 7480-7501). The attorney fee award was entered against Spice and Plexus in the amount of $132,790.65. This was the same amount that was previously entered against the Plaintiffs (including Doris Mathews) on December 13, 2013. CP 2574-2590. Appellants filed a Fourth Notice of Appeal, appealing both the CR 11 and 64.40 Orders.

On May 20, 2016, Final Judgments were entered on the CR 11 Award and on the Ch. 64.40 RCW Award, from which Appellants filed their Fifth Notice of Appeal.

III. LAW AND ARGUMENT

A. The Trial Court's Findings of Fact are Verities on Appeal

In a findings of fact "dump," Appellants assign error to 77 findings of fact in their Amended Opening Brief ("Brief"), spread out over four Orders.[11] However, they have not presented any argument to this Court as to why the specific findings are not supported by the evidence. Accordingly, these findings must be treated as verities on appeal.

> As a general principle, ***an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are***

[11] *See, Amended Opening Brief*, at 6-9.

> ***not supported by the evidence and to cite to the record to support that argument***. *See* RAP 10.3. For the most part counsel has not done this.
>
> ***Strict adherence to the aforementioned rule is not merely a technical nicety.***...If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Matter of Estate of Lint, 135 Wn.2d 518, 531-532, 957 P.2d 755 (1998) (emphasis added). In *Lint*, the Court held that "all [findings] which were either not challenged or were challenged improperly, as verities." *Id.* at 533. The Court should find the same here.

Additionally, Appellants have failed to provide the text of the findings of fact and conclusions of law to which they assign error, and this is in violation of RAP 10.4(c)[12]:

> (c) Text of Statute, Rule, Jury Instruction, or the Like. If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, ***finding of fact***, exhibit, ***or the like***, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

RAP 10.4(c) (emphasis added). Appellants have failed to "type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief" as required by RAP 10.4(c). This is not an optional requirement. The word "should" in RAP 10.4(c) is a word of command, not

[12] *See,* City's previously filed *Motion to Strike Appellants' Amended Opening Brief.*

merely a suggestion. RAP 1.2(b). The necessity for strict compliance with RAP 10.4(c) was emphasized by the Court in *Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983):

> RAP 10.4(c) was promulgated by this court in aid of expeditious and orderly appellate procedure and is the result of a long background of experience...
>
> To assure the rule accomplishes its intended purpose of improving and expediting appellate procedure, we must enforce it by requiring full compliance with its clear requirements. *** ***Fair warning has been given, however, that this court expects full compliance with RAP 10.4(c) and the failure to do so may result in measures as severe as nonconsideration of the claimed error.***
>
> In the case now before us, we are again faced with a situation where the clear requirements of RAP 10.4(c) have been ignored... If there is to be a rule, there must be a point at which failure to comply therewith can no longer be tolerated. That point has been reached in the present case. Therefore, ...we refuse to consider petitioners' claimed errors.

Thomas v. French, 99 Wn.2d at 100-101 (emphasis added). Again, because of Appellants' failure to comply with this Rule, the trial court's findings are verities on appeal, and the findings in and of themselves support affirmation of the Orders and Judgments.

B. Response to Appellants' Challenges to the Trial Court's September 12, 2008 LUPA Order[13] (Oct. 10, 2013 *Notice of Appeal*)

Though Appellants attempt to direct the court that this litigation is simply a LUPA appeal, it is, in fact, a predominately an appeal of the 64.40 damages portion of the case. Nevertheless, the City will address the actual

[13] A copy of this Order (CP 664-668) is attached as **Appendix B**.

2008 LUPA decision here. In their challenge to the Trial Court's September 12, 2008 *Order Affirming Decision of Pierce County Hearing Examiner, and Remanding Case for Further Proceedings*, Appellants make the following arguments: 1) that Puyallup breached its duty to provide water service; 2) that the Hearing Examiner determined Puyallup breached its duty to provide water service; 3) that Puyallup may not contest findings or conclusions from the Hearing Examiner rulings which they did not appeal; 4) that the State has pre-empted water service laws and Puyallup may not unilaterally amend State law; 5) that the Hearing Examiner had authority to require the City to provide water to the Appellants' property; and 6) that the trial court erred in dismissing Appellants' alternative claim of declaratory relief.[14] Appellants' arguments fail because they never sought remand to the Hearing Examiner, as the trial Court ordered in 2008, all water service claims are moot since the Pierce County Code has changed and the remedy Appellants seek is no longer available, the City of Puyallup Code has changed and annexation is no longer required, and the claims regarding the water service claims lack merit.

Due to Appellants' own conduct and through no fault of the City, the Court's September 12, 2008 Order has been left languishing without any compliance by the Appellants or action of any kind on it. That Order required that the case be "remanded to the Pierce County Hearing Examiner

[14] Many of Appellants' claims relating to this and the other challenged Order(s) lack citation to legal authority, cogent argument, or references to the record, or they are mere conclusory argument, in violation of RAP 10.3(a)(6) and, therefore, do not merit this Court's consideration. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2013).

for proceedings consistent with this ruling," (CP 668, ¶ 2), to have the Examiner "determine what reasonable pre-conditions the City of Puyallup might place upon the furnishing of water . . . including whether Puyallup may require annexation of Petitioners' real property into the City as a pre-condition of providing commercial water service to Petitioners and/or to processing an appropriate application for water service or changes in water service (whether commercial or residential) in accord with pertinent Puyallup Municipal Code." CP 667-668, ¶ 1. This Order also bifurcated the ch. 64.40 damage claim from the LUPA and declaratory claims. Appellants (Petitioners) utterly failed to pursue their claims following entry of this Order and they never complied with the mandates of the Order. There has been no remand to the Pierce County Hearing Examiner, no remand decision by the Examiner,[15] and Appellants have never complied with the City's codified requirements for water service, all as the Court ordered.

Further, Appellants never sought modification or reconsideration of the Order, and never sought interlocutory review of it. The time period for seeking any other relief from the Hearing Examiner or requesting further review by this Court of the underlying water service or water condition issues asserted by Appellants expired many years ago and can no longer be asserted. And, the Examiner's August 7, 2007 decision, which is in favor

[15] Moreover, as discussed below, due to a change in Pierce County Code effective January 1, 2011, the Pierce County Hearing Examiner no longer has jurisdiction to consider or rule upon water service conditions or requests, or water system disputes, including the one at issue here. Petitioners' failure to follow through with the Court's remand Order before the County eliminated the Examiner's jurisdiction to hear this dispute has now created a conundrum – an apparent impossibility of compliance with the Court's September 12, 2008 remand requirement. CP 1717, ¶¶ 6 – 7; CP 1733-1744.

of the City and County, is final, binding and the law of the case. The bifurcated LUPA and declaratory claims are, therefore, time barred, unassailable and were properly be dismissed.

1. Overview of Puyallup's Water Service Application Process

In late June of 2004, the Puyallup City Council adopted Ordinance No. 2790, codified in Puyallup Municipal Code ("PMC") at Chapter 14.22, establishing standards and criteria for City water service to properties outside the City limits. CP 1517, CP 1522-1526. Former PMC ch. 14.22[16] required an applicant seeking a water or sewer connection or extension outside the City limits to, *inter alia,* agree to annex to the City,participate in a pre-application conference, submit a written application, pay an application fee to the City of Puyallup, submit to an approval review before the City Council, attach to the application a construction permit issued to the applicant or their contractor, and agree to pay monthly sewer and/or water service charges. CP 1522-1526 (former PMC 14.22.011, and .020).

2. Appellants' "Water Service" Claims and any Challenges to the Hearing Examiner's Decisions are Moot and Non-Reviewable

Despite making the same arguments and asserting the same theories repeatedly before the County Hearing Examiner and several judges of the trial court, Appellants have not prevailed on their water service claims – or on any motion or hearing in this lawsuit. CP 1654-1664; 1829-1868. However, Appellants' prior losses and adverse decisions before the Hearing

[16] *See,* Appendix A.

Examiner are overshowed by one more significant fact: their "water service" claims and challenges, as well as any challenges to the Hearing Examiner's 2007 decisions (even though the last of those was in favor of the City) have been rendered moot and non-reviewable by virtue of two legislative charges – one by the Puyallup City Council, the other by the Pierce County Council.

a. The First Change: City's Annexation Requirement was Eliminated as of July 18, 2011. On July 5, 2011, the Puyallup City Council passed Ordinance No. 2983 which eliminated the prior requirement for annexation as a condition of receiving City water service to properties outside of the City, and became effective on July 18, 2011. CP 1517.[17] Since this date, Appellants can request water service (or a change in service) without annexing to the City or signing a covenant to annex in the future, but they have not done so. Annexation is no longer applicable to Appellants' property.

b. The Second Change: Pierce County Changes its Code and Eliminates Hearing Examiner Review of Water System/Water Service Disputes as of January 1, 2011. The Pierce County Council adopted Ordinance No. 2010-88s[18] which became effective on January 1, 2011, and made changes to Pierce County's review and processing of its coordinated water system plan including, significantly,

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[17] This ordinance was never challenged by any party, remains in effect, and the statute of limitations for challenging it expired long ago.

[18] The Court can take judicial notice of adoption of Ordinance No. 2010-88s.

eliminating Pierce County Hearing Examiner review of water system and water boundary disputes. CP 1717 ¶¶ 6 – 7.[19]

Pursuant to this ordinance, the Pierce County Hearing Examiner no longer has authority to hear challenges to claims or disputes concerning water system or water service (such as this dispute). Thus, since January 1, 2011, the Pierce County Hearing Examiner cannot hear Appellants' water service and annexation condition disputes, or to entertain a remand. *Id.*

3. Appellants have Never submitted a Written Application for Water Service or Complied with City Water Service Application and Service Requirements

Appellants have never submitted an application for water service that satisfied the requirements of Puyallup's (water service) Code. CP 1518-1519, CP 1723-1724. They have never submitted a written application for water service or a change in water service; nor have they had or requested a pre-application meeting with the City, paid any application fee, asked for City staff review of any proposed application, requested a City Council hearing or review of any proposed application or submitted plans for water service or change of water service. *Id.* The City has no record of any application by Ted Spice, Plexus Development, LLC, or Doris Matthews for water service or a change of water service. *Id.*

4. Appellants can get City Water Service Without Annexation; The City is Ready, Willing and Able to Provide Water Service Upon Compliance with Code Requirements

[19] Ordinance No. 2010-88s was never challenged by any party, remains in effect, and the statute of limitations for challenging it expired long ago.

The City has always been ready, willing and able to provide new or additional water service to Appellants' properties upon submittal of complete application materials, payment of application fees and compliance with codified City water service requirements. CP 1518. And, since July 18, 2011, Appellants do not have to agree to annex their property to the City or sign a covenant agreeing to annex in the future. CP 1519-1520, ¶ 11.

5. The Regional Water Service Agreement has no Bearing on Appellants' ch. 64.40 Claim or Any Other Claim

Appellants spend nearly 11 pages of their Brief (pp. 28-39) describing and quoting from the Pierce County Regional Water Service Agreement, the Public Water System Coordination Act (RCW ch. 70.116), a water law statute (RCW ch. 43.20), and redundant arguments over alleged contractual breaches by the City to the Regional Water Service Agreement or to the dispute resolution process. This is a red herring argument since such challenges are now moot or precluded, none of it is relevant, and it does not provide any basis for liability under ch. 64.40, or any of Appellants' claims.

The Regional Water Service Agreement and the related dispute resolution process are intended to determine water service areas (purveyor versus purveyor; not purveyor versus customer or applicant). They are not intended to deal with liability for specific water service applications for permits by individual water service customers, or to resolve City permitting decisions. Rather, this Agreement and process is intended to establish "a local management framework for planning and development of water

services," and a mechanism to provide resolution to "service area and timely and reasonable disputes." PCC 19D.140.080. Nothing in the statute or in the interlocal agreement or any other document applies this water service agreement or process to a ch. 64.40 damage claim.

Second, there is no case or authority anywhere applying a water service plan or regional water service agreement, or any action under RCW ch. 70.116, RCW ch. 43.260 or RCW ch. 43.20 to permit liability under ch. 64.40. No such authority exists.

Third, as clearly described in the Agreement and implementing County regulations, as well as the companion water service statues at RCW ch. 43.20, the only relief available is to either put the applicant's property within a water service purveyor's service area or, alternatively, to remove it from such an area so that they can seek water from other sources (such as other purveyors, private wells, shared wells, *etc.*). No damages are authorized for violation of the water service agreement or the County's implementing ordinance (PCC ch. 19D.140). The remedies in the water service plan and even for violation of the "timely and reasonable" water service requirement are equitable in nature, and do not contemplate or authorize damages.

Fourth, the remedies are not mutually exclusive. Thus, while Appellants may have had a potential remedy available to them through the Pierce County Hearing Examiner on a *bona fide* water system "dispute" (not an application), such action does not supersede or otherwise abrogate the definitional and exhaustion requirements under RCW ch. 64.40, and the

separate City of Puyallup code requirements which are mandatory prerequisites to obtaining water service from the City or a change of service from the City. In other words, just because Appellants may have sought some equitable relief through the water service dispute resolution process authorized through the Water System Plan and Agreement does not in any way eliminate or alter their obligations to meet every requirement for water service under the City's Code and every statutory and definitional requirement for damages liability under ch. 64.40.[20]

6. State law Supports the City's Right to Require Annexation as a Condition of Receiving Water Service Outside the City Limits

While the Court needs to address Appellants' "duty to serve" and annexation condition arguments because they have been rendered moot, can no longer be reviewed and the remand to the Hearing Examiner is now an impossibility, even if review were available, there is no merit to Appellants' claims. The duty to serve and City annexation requirement claims fail as a matter of law because Washington law authorizes – but does not require – a city to provide utility services outside its corporate boundaries. RCW 35.67.310; *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 381-82, 858 P.2d 2457 (1993). As a general rule, a

[20] This makes both practical and legal sense. Otherwise, every time there was a request for relief under the Regional Water Service Agreement or one of the water service statutes, it would turn such a claim into an automatic ch. 64.40 liability claim simply based on a "dispute" between a water purveyor (for example, the City) and a water service applicant (such as Spice). Such action would ignore the statutory predicate requirements for liability under ch. 64.40 and turn it into a contract liability statute. This is neither the law nor good public policy.

municipality does not have a duty to provide water or sewer service outside its corporate limits. *Id.*; *Brookens v. City of Yakima*, 15 Wn. App. 464, 465-66, 550 P.2d 30 (1976); *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 515-16, 84 P.3d 1241 (2004). The authority to serve is discretionary and permissive only; therefore, the fact that "outside city" utility authority is permissive means that "supply is a matter of contract between municipality and property owners," and that "[i]n the absence of contract, express or implied, a municipality cannot be compelled to supply water outside its corporate limits." *Brookens, supra,* 15 Wn.App. at 464; *Harberd, supra.* 120 Wn.App. at 515-16.[21]

In *Brookens* and *Harberd* the city's motion for summary judgment was upheld despite the fact that the city had previously supplied water to a user on the property to be developed, just as Puyallup has previously supplied water to Petitioners' properties – albeit for residential use.[22]

> The power to supply water beyond corporate limits is permissive, with supply being a matter of contract between the municipality and property owners. In the absence of

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[21] More recent unpublished cases are to the same effect. *See, Governor's Point Development Co. v. City of Bellingham*, 175 Wn.App. 1008 (Div. I, 2013) (historically providing water to properties around Plaintiffs' properties and upgrading water main near the property do not demonstrate implied contract by City to provide water service to all in the area or establish the City's willingness to supply water to all users); *Figaro v. City of Bellingham*, 2016 WL 3570564, *slip op.* at 6 (Div. I 2016) (City provision of water service to significant number of customers on Yew Street is not evidence of intent to serve all property owners in Yew Street area; requirement for consent to annexation was dispositive of claim that City intended to serve all owners in Yew Street who requested it). A September 1, 2016 amendment to Washington Court Rule GR 14.1 now allows citation to unpublished Court of Appeals decisions.

[22] The City's Code, at the time, required annexation or an agreement to annex as a condition of a change in water service, such as what Petitioners now claim they requested, i.e., residential to commercial use. *See,* PMC 14.22.020 and Title 14 generally (Appendix A).

> contract, express or implied, a municipality cannot be compelled to supply water outside its corporate limits.

Brookens, 15 Wn. App. at 465-66; *Harberd,* 120 Wn. App. at 515-16. Quoting an ALR, the *Brookens* court added:

> [A] city cannot be compelled to supply water to anyone outside its limits, even if it is already engaged in doing so in a given extra-territorial area, where it has made merely limited and special contracts to do so with particular parties and has not placed itself by contract or conduct in a position of a public utility subject to regulations, . . .

Brookens, 15 Wn. App. at 466, n.3, quoting 48 ALR 2nd 1222.

The *Brookens* decision confirms three key points. First, just because the City had long supplied water to a residence on the property proposed for development did not create an inference that the City held itself out as ready to serve all applicants unconditionally. Second, the fact that a City water main ran through the property did not create an inference that the City held itself out as ready to serve all applicants, or to serve them unconditionally. And, third, the fact that a City water main ran through the property did not create an inference that the city held itself out as ready to serve all applicants unconditionally; but rather it implies "an intent not to supply the general area indiscriminately, nor expand any prior agreement with the Brookens."

In *Harberd*, the court upheld the City's refusal to extend City water to additional lots on a parcel outside its City limits despite a long history of earlier extensions of City water to lots previously carved out of the same 103-acre parcel. After providing water to new lots in 1983, 1985, 1988, and

1989, the City in 1994 adopted a moratorium on new out-of-town hook-ups and denied Harberd's request for water to eight additional hookups. Upholding the City's summary judgment, the court rejected arguments that the City had held itself out as a "public utility" because "the record shows the City historically retained ***discretion to grant or deny water hookups***." *Harberd*, 120 Wn. App. at 517 (emphasis added). Here, the City's code likewise shows that the City of Puyallup was willing to provide water services or allow for a change in water services to properties outside the City limits only upon annexation or an agreement to annex in the future and only upon compliance with all other code requirements.[23] *See,* PMC ch. 14.22. This has been a policy and codified requirement of the City since 2004. CP 1517, ¶ 3; 1519, ¶ 10.

7. The *Stanzel* Case is Inapplicable, Irrelevant and Should be Disregarded

A substantial part of Appellants' Brief (pp. 41-45) is predicated upon various Hearing Examiner rulings from an unrelated and inapplicable lawsuit – *Michael Stanzel v. City of Puyallup and Pierce County* (as well as a related case brought by the City, *City of Puyallup v. Michael Stanzel and*

[23] The Trial Court in its September 12, 2008 Order did not invalidate, find unenforceable or otherwise refuse to recognize the City's annexation requirement. Instead, this Court remanded the matter to the Hearing Examiner to make a determination whether, under the specific facts of this case "*Puyallup may require annexation of Petitioners' [sic] real property into the city as a pre-condition providing commercial water service to Petitioners and/or to processing an appropriate application for water service or change in water service ...*". CP 667-668 (emphasis added). Even in Michael Stanzel's unrelated and non-binding water system dispute (see discussion in next section), the Hearing Examiner in that case recognized that the City had authority to require a pre-annexation agreement as a condition of receiving water service ("a successful challenge, ***while not affecting the City's authority to require a pre-annexation agreement***, would allow an applicant to seek an alternative water supply and/or other relief"). CP 1945.

Pierce County). The *Stanzel* cases are not precedent for or applicable to this matter,[24] and for many reasons they are distinguishable on its facts and law. CP 1910-1912, CP 1925-1954.

A summary of key differences between these two cases is set forth in the chart at CP 1950-1954. Among the many differences between these two cases are the following:

- They involve completely different water service applicants, and there was never any overlap between these applicants in either of the two cases. In the *Stanzel* case, the sole petitioner and applicant for water service was Michael Stanzel, a single man. In this case, the petitioners and water service applicants are Ted Spice, Plexus Development, LLC and (sometimes) Doris Mathews. CP 1910-1912, ¶ 4.]

- The cases were assigned different cause numbers. *Id.*

- The cases were heard before different Pierce County Judges at approximately the same time. In the *Stanzel* case, Judge Thomas Larkin made the trial court rulings. In this (*Spice*) case, Judges Chushcoff and Nevin rendered the rulings. *Id.*

- Different attorneys represented the petitioners/water service applicants in the two cases. Attorney J. Richard Aramburu represented Michael Stanzel in the *Stanzel* litigation. In this case, attorneys Carolyn

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[24] The City is aware of no legal authority that one court can rely on administrative law and trial court decisions from an entirely different case involving different parties, different properties, different claims, different judicial and administrative processes, and decided by different judges. The fact that the Pierce County Hearing Examiner and Judge Larkin may have made different rulings in the *Stanzel* case does not have any applicability to the specific rulings in this case made by Judge Chushcoff (and in the earlier, 2006 case, Judge Felnagle). Rather, the Court's September 12, 2008 Order in this case is the law of the case, and the rulings in it are binding on the parties to this lawsuit. *See,* 14A Wash. Prac., Civil Proc. § 35:55 (2nd Ed.); *Richardson v. United States,* 841 Fed.2d 993, 996 (9th Cir., 1998) ("Under the 'law of the case' doctrine, a court is ordinarily precluded from re-examining and issue previously decided by the same court, or a higher court, in the same case."). It is a basic rule of law, routinely enforced, that when a court decides upon a rule of law, that decision should continue to govern the same issues and subsequent stages in the same case. *L.I. Headstart Child Development Services, Inc. v. Economic Opportunity Comm'n of Nassau County, Inc.,* 820 Fed. Supp.2d 410 (E.D.N.Y. 2011).

Lake and Stephen Hansen represented the Petitioners Spice, Plexus and Mathews. *Id.*

- The actual rulings by the Pierce County Hearing Examiner are radically different in the *Stanzel* and *Spice* cases. *Id.*

- The various hearing examiner and trial court and appellate court decisions in the *Stanzel* case were based primarily on procedural issues and process issues. None of the rulings went to the merits of the City's annexation requirement on its face. *Id.*

- In the two Court of Appeals decisions in the *Stanzel* case, the Court made clear the decisions were limited to the specific facts and posture of these cases. *See: Stanzel v. Puyallup,*150 Wn. App. 835, 853, 209 P.3d 534 (2009) (Accordingly, we hold that the Hearing Examiner, in this ***fact pattern***,...") (emphasis added); *Puyallup v. Stanzel,* 157 Wn. App. 1014 (unpublished) (2010) ("our previous ruling affirmed the Hearing Examiner's decision that annexation was not a reasonable requirement because Stanzel's proposed changes did not substantially increase the amount of water used by the property. . . . The basis of the City's instant LUPA Petition is that Stanzel has submitted new evidence showing that he has proposed changes would substantially increase water used by the property. If the City's allegations are true, they may amount to a substantial change in Stanzel's proposal that under minds reliance on the factual basis of our prior ruling, thus defeating *res judicata* for lack of identity of subject matter.").

- At no time in the *Stanzel* litigation did the Pierce County Hearing Examiner, the Pierce County Superior Court (Judge Larkin), or any appellate court issue a ruling, order or decision which invalidated the City of Puyallup's long-standing annexation requirement, or which declared that annexation requirement unconstitutional, "illegal," or otherwise unenforceable, or that it was arbitrary, capricious or excess of lawful authority. The validity of the City's annexation requirement was never litigated in any of the *Stanzel* proceedings.[25]

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[25] In fact, in *Stanzel v. Pierce County, supra,* the Court actually recognized the legal authority for cities to condition water service outside of the city limits on annexation. The Court held: "As established above, requiring new applicants for water service or service extensions outside of the city limits to agree to a pre-annexation agreement ***is not per se unlawful***. Cases such as *Yakima County (West Valley) Fire Protection* and *MT* revealed that an exclusive provider of sewer service may improve reasonable conditions on its service agreement, including conditions beyond its capacity to provide service. [citations omitted]". *Stanzel,* 150 Wn. App. at 852 (emphasis added).

- In the *Stanzel* matter, at no time did the Pierce County Hearing Examiner, the trial court or any of the appellate courts ever get to the merits of Mr. Stanzel's RCW ch. 64.40 claim. This claim was never litigated at any level of in the *Stanzel* case. There was never any briefing, argument or administrative or judicial decision on the ch. 64.40 claim. *Id.*

C. Response to Appellants' Challenges to the Trial Court's June 21, 2013 Summary Judgment Order and September 10, 2013 Reconsideration Orders[26] (Oct. 10, 2013 *Notice of Appeal*)

In their challenge to the Trial Court's June 21, 2013 *Order Granting Summary Judgment, Dismissing Case with Prejudice and Awarding Attorney Fees*, and September 10, 2013 *Order on Motion for Reconsideration*, Appellants make the following arguments: 1) Appellants have a property interest; 2) Puyallup failed to act within the time period required; 3) the failure to act on a water application is a land use action; 4) the lapse of years does not diminish Appellants' damages; 5) Appellants were not required to exhaust the City remedies; and 6) the doctrine of futility defeats Puyallup's claim of no application.[27]

As a preliminary matter, Trial Court's June 21, 2013 "*Order Granting Summary Judgment, Dismissing Case with Prejudice, and Awarding Attorneys' Fees*" and its September 10, 2013 "*Order on Motion for Re-Consideration*" has been rendered null and void, and superseded by the Trial Court's July 20, 2015 "*Findings...*", which voided all Orders entered by the trial court between December 8, 2009 and December 2013,

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[26] Copies of these two related orders (CP 1141-1144; CP 1365) are attached as Appendices C and D.

[27] Again, many of Appellants' claims relating to these orders lack citation to authority, cogent argument, or references to the record, or are mere conclusory argument, in violation of RAP 10.3(a)(6) and, therefore, do not merit this Court's consideration. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2013).

by virtue of Appellants' and their attorney's failure to disclose to the Trial Court the death of Ms. Mathews, the majority owner of the property. CP 3409-3421. Accordingly, the Court need not separately evaluate these two orders, except to note that the trial court fully and properly vetted Appellants' claims and arguments and, notwithstanding the (then unknown) absence of the majority property owner in the case at the time, properly dismissed the claims and the case. Since dismissal of Appellants' lawsuit on the City's second Summary Judgment Motion in 2015 (CP 2638-2650) was based in part from this first Motion (CP 1652-1696), a summary of those arguments and Appellants' responses are set forth below.

The Complaint contains three causes of action, all of which were the subject of the City's first (March 29, 2013) Summary Judgment Motion: A declaratory judgment claim; a petition for review under the State Land Use Petition Act (LUPA); and an RCW ch. 64.40 damages claim. The September 12, 2008 Order bifurcated Petitioners' RCW ch. 64.40 damage claims from the two other claims (the LUPA and declaratory judgment claim). Because Appellants never fulfilled the requirements of the September 12, 2008 Order, and never complied with the City's codified requirements for water service, as the Court ordered, none of their claims can or could be established. All three claims were fully vetted by the Court and properly dismissed.

1. The Trial Court Properly Dismissed the Declaratory Judgment Claim

Appellants' declaratory judgment claim, an alternative to the now final and unreviewable LUPA claim (see below), was bifurcated from the ch. 64.40 claim. It too, is final, binding and unreviewable. Additionally, the Court's September 12, 2008 Order on p. 3, ¶ 5, provides:

> *With the entry of this Order as to the LUPA matter, the declaratory judgment action is moot.*

CP 668. The Court found the declaratory judgment claim to be "moot" on September 12, 2008, and it became a final decision on that date. Again, Appellants never sought to modify or reconsider the mootness ruling, and they never sought appellate view of this part of the Order. The time limits for seeking reconsideration, modification or discretionary review (or appeal) of this claim have expired, and this declaratory claim is moot is final, binding and un-reviewable.

2. The Trial Court Properly Dismissed the LUPA Claim

The LUPA claim – as well as the underlying Hearing Examiner review – was properly dismissed for many reasons. First, in response to the City's first Summary Judgment Motion, Appellants stipulated that the LUPA claim has been "***fully adjudicated***." CP 1920-1921 (emphasis added). This is a judicial admission by Appellants and they are bound by it. As discussed *infra*, dismissal of the LUPA terminates all further review by the Hearing Examiner and the Trial Court of the Examiner's Findings of Fact, Conclusions of Law or Decision as well as the Examiner's "corresponding procedures." Dismissal renders these proceedings a nullity,

"and leaves the parties in the same position as if the action had never occurred." *Spice v. Pierce County,* 149 Wn. App. at 464-467.

Second, because the Court in its Order bifurcated this claim from the ch. 64.40 damage claim, it is a stand-alone cause of action and it became final upon entry of the Order on September 1, 2008. Any challenge to dismissal of this claim became time barred after all reconsideration, modification and appeal or discretionary review deadlines expired – no later than 30 days after that date (October 12, 2008). Appellants never sought reconsideration, modification or discretionary review of this LUPA claim, as they had a right to do.[28] Accordingly, this final, stand-alone claim/cause of action is time-barred from any appellate review.

Third, the LUPA claim was also properly dismissed due to Appellants' failure to comply with the Court's September 12, 2008 Order.[29] That Order contained at least two substantive requirements imposed on

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[28] A motion for reconsideration of the LUPA Order should have been filed no later than 10 days following issuance of the Order (or no later than September 22, 2008). *See,* CR 59(b) and (h) and PCLR 7(c)(2). Any modification of the Order under CR 60 should have been requested within either a "reasonable time," or – at the latest – within one year of entry of the Order (no later than September 12, 2009). *See,* CR 60(b). Any appeal of this part of the Order should have been filed within 30 days of the Order (no later than October 12, 2008). *See,* RAP 5.2.

[29] Under Civil Rule 41, the Court's authority to dismiss a case for non-compliance with Court orders and decisions is well established:

> Under CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules. A trial court also has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. It may impose such sanctions as it deems appropriate for violation of its scheduling orders to effectively manage its caseload, minimize backlog, and conserve scarce judicial resources.

Woodhead v. Discount Waterbeds, Inc., 78 Wn .App 125, 129, 896 P.2d 66 (1995).

them, neither of which they complied with. The Court remanded to the Examiner to complete the administrative review:

> *This matter is remanded to the Pierce County Hearing Examiner for proceedings consistent with this ruling.*

CP 668, ¶ 2. Appellants never asked the Pierce County Hearing Examiner to re-open, modify or otherwise complete his decision, or to follow-up on the Court's Order. There was never any remand to the Pierce County Hearing Examiner for "proceedings consistent with [the Court's] ruling." CP 1700, ¶ 10; CP 1716, ¶¶ 4 – 5. They never asked the Examiner to conduct further proceedings "consistent with [the Court's] ruling" to determine "what reasonable pre-conditions the City of Puyallup may place upon the furnishing of water" to their property, "including whether Puyallup may require annexation of Petitioners' [sic] real property" as a condition of providing water service to them, as well as requiring the City to process an appropriate application for water service or changes in water service "in accord with pertinent Puyallup Municipal Code." *Id.* Additionally, now the Pierce County Hearing Examiner no longer has jurisdiction[30] to entertain issues on this water service dispute or to comply with the Court's remand. CP 1717, ¶¶ 6-7; CP 1733-1744. Appellants' failure to follow through with remand to the Hearing Examiner before it lost jurisdiction to hear this matter has now created an impossibility to compliance with the Court's Order,

[30] Since January 1, 2011, the Pierce County Council has divested the Pierce County Hearing Examiner from hearing challenges to or claims regarding water system disputes, water service disputes or general water service issues to retail customers (such as this dispute).

prejudiced all of the parties, and rendered the LUPA part of the Court's Order a final decision no longer reviewable.

Fourth, aside from non-compliance with the Order, the trial court also had authority to dismiss the LUPA claim for Appellants' unreasonable and unexplained delay in prosecuting this action, in failing to seek remand, failing to apply to the City for water service or otherwise comply with the City's codified water service requirements, or to do anything to move this matter along or obtain water service. Appellants' delay and inattention to this lawsuit has severely prejudiced the City and created multiple procedural obstacles and quandaries which, independent of the grounds discussed above, merit dismissal of the case. *See, State ex rel. Dawson v. Superior Court,* 16 Wn.2d 300, 304, 133 P.2d 285(1943) (When confronted with an action not diligently prosecuted, dismissal of the action is necessary in the "orderly administration of justice").

3. The Trial Court Properly Dismissed the RCW ch. 64.40 Damages Claim

Because the Hearing Examiner's 2007 Decision is now final, binding and in favor of the City, under established case law this determination precludes liability under ch. 64.40. Stated another way, the Hearing Examiner's August 7, 2007 decision which was in favor of the City (and County), as well as Appellants' failure to achieve relief under LUPA to support their claims bars their ch. 64.40 damage claim. The now-final and favorable to the City Hearing Examiner's decision, and the now time-barred LUPA, renders the City's actions regarding Appellants' water

service claims lawful, valid and final, and precludes a finding of liability under RCW ch. 64.40.020(1).

And, notwithstanding the aforementioned judicial impediment, Appellants cannot meet numerous other predicate requirements for ch. 64.40 liability. For example, Appellants' Ch. 64.40 claim failed because they never submitted an application for water service to the City, they never complied with any City process or procedure for obtaining water service, the City never made any final (or other) decision on any alleged application, they never appealed any decision to the City's hearing examiner, as required by City code, they lost before the Pierce County Hearing Examiner, thus barring their ch. 64.40 claim, they never complied with Judge Chuchcoff's September 12, 2007 Order (which required them to follow City code requirements for water service, among other things), they could never satisfy the requirements or a "permit" (a request for resolution of a "water dispute" does not meet the definition of "permit" in RCW 64.40.010(4)), they could not satisfy the significant liability standards in RCW 64.40.020(1), the City never placed any requirements, limitations or conditions on the use of their property in excess of those allowed by applicable regulations by the City in effect on the date an application for permit was filed (even assuming such an application was filed), the City never made any decision or took any action that meets the requirements of an "Act" as defined by RCW 64.40.010(6), and they never exhausted remedies by seeking a variance, a waiver or seeking a code interpretation of

any alleged act or action or requirement by the City. Each of these bases for dismissal is discussed briefly below.

a. Overview of RCW ch. 64.40. Enacted in 1983, ch. 64.40 is a narrow and limited statutory cause of action that allows redress when a local government agency acts illegally or arbitrarily with regard to an application for a land use permit, and only after the party exhausts all available administrative remedies, timely seeks judicial review (within 30 days of exhaustion) and otherwise satisfies various predicate requirements to assert a claim. *See, e.g.*, RCW 64.40.010 - .030 generally. *See, also*: *Brower v. Pierce County*, 96 Wn. App. 559, 984 P.2d 1036 (1999). RCW ch. 64.40 is, by design, not available when no application for a permit as defined in the statute is ever made, or when administrative processes are not followed or completed, or where all remedies are not exhausted, or where the LUPA process is not completed. For example, relief under ch. 64.40 is only available to landowners who have actually applied for a permit – as specifically defined in the statute[31] – and actually pursued and exhausted their administrative remedies. *Brower v. Pierce County*, *supra*. (relief is only available where an "act" is appealed to adverse decision in the administrative process).

b. The Ch. 64.40 Claim was Properly Dismissed for Numerous Reasons. While there are numerous impediments to ch. 64.40 claim, Appellants' failure to comply with the Court's Order, complete the

[31] *See, e.g., Birnbaum v. Pierce County*, *supra*, and *Manna Funding LLC v. Kittitas County*, *supra*.

LUPA process before it became time-barred, submit an application for water service from the City, comply with City water service requirements, and otherwise exhaust administrative remedies each bar this claim. At its core, the ch. 64.40 claim simply was never ripe, and Judge Nevin properly dismissed it on summary judgment (twice).[32]

First, Appellants' failure to Complete the LUPA Review, which is now time-barred, renders the Hearing Examiner's August 7, 2007 Decision Final, and the City's actions valid, lawful, binding and unreviewable, and this precludes liability under RCW ch. 64.40. A land use decision – such as Appellants' challenge to the City's water service requirements and/or the City's former annexation requirement – that is not successfully challenged is ***final, lawful and valid***, even if it is imprudent, invalid or illegal. *See, e.g., Habitat Watch v. Skagit County,* 155 Wn.2d 397, 407, 120 P.3d 56 (2005) ("[e]ven illegal decisions must be challenged in a timely, appropriate manner"); *Chelan County v. Nykreim,* 146 Wn.2d 904, 926, 52 P.3d 1 (2002) (boundary line adjustment granted in violation of the law became lawful and valid once opportunity to challenge it under LUPA had passed). Thus, any purported decisions made by the City regarding Appellants' claimed requests for water service, or the City's enforcement of its codified annexation requirement, became lawful, valid and final upon issuance of

[32] In actuality, and as discussed below, Appellants' ch. 64.40 claim never should have been brought at all due to the unfinished LUPA action. Judicial review must be sought within 30 days of the local government agency's final decision. RCW 64.40.030. Here, no final (or even initial or partial) decision has been made by the City regarding Appellants' property for the simple reason that they have never formally applied to the City for any new or changed water service for their properties or otherwise complied with the City's water service requirements.

the Court's Order – or, at least at the very latest once the Pierce County Hearing Examiner lost jurisdiction to entertain any remand. Either on September 12, 2008 or at the latest January 1, 2011 (effective date of Pierce County ordinance eliminating Hearing Examiner review of water disputes), any actions or omissions by the City – as well as the Pierce County Hearing Examiner's August 7, 2007 decision – became final, valid and binding. These decisions are now in favor of the City, thus precluding any claim for damages arising out of them.

When decisions are not challenged or affirmed under LUPA, or the LUPA is not completed, they cannot serve as a basis for damages. *See, e.g.: Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010) ("the plaintiff's failure to challenge that decision in a timely LUPA petition bars... claims for damage under 42 U.S.C. § 1983, because those claims are simply challenges to the approval of the agreement."); *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901, 37 P.3d 1255 (2002) ("if the petitioner loses the LUPA appeal, the damages case is moot and the matter is over"); *Mower v. King Co.*, 130 Wn. App. 707, 720, 125 P.3d 148 (2005) (because underlying decision was upheld on LUPA petition, plaintiff was not permitted to pursue damages action); *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) (dismissing nuisance claim that depended upon propriety of building permit decision subject to land use review under LUPA). The failure to properly challenge a permit

decision through LUPA "dooms" damage claims.[33] *Mercer Island, supra,* 156 Wn. App. at 405.

Here, the LUPA was never completed. The Court ordered a remand for the Examiner to make determinations going to the very heart of Appellants' claims. That remand requirement – at least as to the Hearing Examiner – has now been rendered an impossibility due to Appellants' failure to prosecute this case. And, the bifurcated LUPA part of this case through the Court's Order is now final and unreviewable.

Second, related to the above, the Court's September 12, 2008 Order imposed a specific requirement on Appellants before they could go forward with their ch. 64.40 damage claim. As the Trial Court ordered, if Appellants want water service from the City,

> *... they have to comply with the application process set forth in pertinent Puyallup Municipal Code, except insofar as the Code is inconsistent with this Order.*

CP 668, ¶ 3. They have never done this.

Third, Appellants never submitted an application for water service or a change of service pursuant to the City Code requirements. CP 1699-1700, ¶¶ 7, 10; CP 1716-1718, ¶¶ 4-5, 8. By law, permits or approvals for connections to the City's water system can be issued "... ***only upon the written application*** of the property owner and subject to the following terms

[33] If plaintiff could disregard LUPA and bring damage claims years later, the legislature's objectives of administrative finality would be frustrated. *See Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 48-49, 26 P.3d 241 (2001) ("this court has stated that if there were not finality in land use decisions, no owner of land would ever be safe in proceeding with development of his property. To make an exception would completely defeat the purpose and policy of the law in making a definite time limit.").

and conditions: …". CP 1707 (emphasis added); PMC 14.22.020. Appellants failed to comply with this requirement. CP 1700, CP 1717-1718, CP 1723-1724. Concomitantly, ch. 64.40 requires – as a predicate to application of the statute – that owners of a property interest must "have filed an application for a permit …". RCW 64.40.020(1), and Appellants have never satisfied this mandate.

Fourth, there was no act or final decision by the City. Under RCW 64.40, a cause of action does not arise until there is an "Act." RCW 64.40.020(1). An "act" is a "***final decision*** by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed." RCW 64.40.010(6) (emphasis added).

Here, there has been no act – no final decision – by the City that would trigger a ch. 64.40 claim. While their 2006 and 2007 LUPA Petitions only vaguely and generally allege that the City won't provide water service to their properties, and more specifically challenge the City's [now former] annexation requirement, the facts are that Appellants have never actually submitted a "written application" for water utility service to the City, as the Code requires.[34] They have never complied with any of the other City

[34] Significantly, neither of the LUPA Petitions or the current Complaint attaches a copy of any purported written application for water service to the City – as they should have assuming one existed. Neither LUPA Petition references any specific date of submittal of a written Code-compliant water service application to the City. Indeed, the most Appellants can muster in this action are vague, non-specific and generalized statements such as: "Petitioners are the Applicants for development of the property subject to the Deputy Examiner's Decision" (CP 3, ¶ F.1); ". . . as development applicants/property owners, Petitioners have constitutionally protected rights to be free of arbitrary and illegal government decision-making and that their property not be damaged or taken by illegal

requirements for water service – requirements that are binding on them (and all others seeking water service). Because of these omissions, the City has never made – and could not make – any decision on any application for water service applicable to them. There has been no "final decision" by the City which would trigger the statute. Without a "***final decision*** by [the City] which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed" (RCW 64.40.010(6)) there can be no right to relief under ch. 64.40.

Fifth, Appellants did not exhaust remedies as required under RCW 64.40.030. A cause of action may only be commenced "***after all administrative remedies have been exhausted***." RCW 64.40.030 (emphasis added). The applicant must exhaust remedies and be harmed by an arbitrary or unlawful "final decision" before a RCW 64.40 claim ripens. *See Brower v. Pierce County, supra.* 96 Wn. App. at 563-564 ("A precondition to the bringing of a claim is provided for by RCW 64.40.030 [all administrative remedies have been exhausted]... A corollary to the exhaustion requirement is that the relief granted by the administrative remedy must be inadequate.").[35] *See also, Birnbaum v. Pierce County*, 167 Wn. App. 728, 731, 274 P.3d 1070 (2012):

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actions or without just compensation" (CP 3); "Petitioners were prejudiced by the failure of the City of Puyallup to recognize and the failure to Pierce County to fully enforce their fundamental constitutionally protected rights" (CP 4).

[35] It is frivolous for Appellants to claim that exhaustion applies only to a LUPA claim, but not a ch. 64.40 claim. It applies to both. *See,* RCW 36.70C.040 and *Ward v. Board of*

> The definition of damages limits recovery to those damages that occur ***after*** the cause of action accrues. ***Simply put, the statute does not contemplate damages—for delay or otherwise—under the final decision prong that occurred prior to the final decision***.

Id. at 737 (emphasis in original). So too here where Appellants have never filed an application, complied with City water service requirements, sought appeal to the City's hearing examiner, received a final and favorable ruling on its LUPA petition, or otherwise received any final decision which would satisfy the exhaustion requirement.[36]

Here, not only has there been no "final decision" by the City, there has been no exhaustion of anything by Appellants. The City's water service code in fact includes an administrative appeal provision which is another form of exhaustion which Appellants never satisfied. *See,* PMC 14.22.090 – "Appeals." This provision allows a water service applicant to appeal "decisions of the City" to the City's Hearing Examiner. *Id.* At no time have the Appellants obtained or even requested an appeal of any City water service decision to the City's Hearing Examiner as mandated by PMC 14.22.090. In *Brower v. Pierce County, supra,* the court emphasized that an agency (such as the City) must have an opportunity to correct its own errors before facing damage claims. 96 Wn. App. at 566. The developer's ch. 64.40 claim was thus denied on this basis. And, as the Court

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County Commissioners of Skagit County, 86 Wn. App. 266, 271, 936 P.2d 42 (1997) (LUPA exhaustion requirement) and RCW 64.40.030 (ch. 64.40 exhaustion requirement).

[36] For the Court to have jurisdiction to entertain a cause of action under ch. 64.40, the statute requires that a permit applicant avail him or herself of the agency's administrative remedies and receive a final decision before seeking judicial review or redress. RCW 64.60.010(6) and 64.40.030; *Birnbaum*; *Brower.* And, a ch. 64.40 claim is not available if the administrative appeals process yields adequate relief.

noted in *Birnbaum,* there can be no delay damages or a claim for arbitrary conduct "occurring prior to a final decision." 167 Wn. App. at 736. Indeed, a ch. 64.40 claim may only be brought "once the permit decision is final," all remedies have been exhausted, and the claim is brought within 30 days. *Id.*[37]

Appellants are not entitled to ignore the City's administrative water application requirements or, as discussed above, fail to obtain relief under LUPA – their exclusive means of relief – and yet seek damages under ch. 64.40. If they could, it would frustrate the legislature's goal of finality in land use decisions, and undermine the salutary purposes of exhausting administrative remedies, which include error correction and application of the agency's expertise.[38]

Sixth, the City never placed any requirements, limitations or conditions on the use of Appellants' property that were "in excess of those allowed by applicable regulations." To ripen an RCW ch. 64.40 claim, there

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[37] The *Birnbaum* Court held: "Simply put, the statute [RCW ch. 64.40] does not contemplate damages – for delay or otherwise – under the final decision prong that occurred *prior* to the final decision." *Id.,* 167 Wn. App. 737 (emphasis in original).

[38] *See, e.g., Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009) ("the [exhaustion] doctrine is founded on the principle that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges, so that the administrative process will not be interrupted prematurely, so that the agency can develop the necessary factual background on which to reach its decision, so that the agency will have the opportunity to exercise its expertise and to correct its own errors, and so as not to encourage individuals to ignore administrative procedures by resorting to the courts prematurely."); *Harrington v. Spokane County*, 128 Wn. App. 202, 211, 114 P.3d 1233 (2005) (rejecting damages claim; noting that "because the administrative review process has not run its course, the agency has had no opportunity to correct any errors it might have made or to develop a factual and technical record for adequate review."); *Phillips v. King County*, 87 Wn. App. 468, 943 P.2d 306 (1997) (agencies entitled to correct their own errors).

must be "a final decision by an agency which places requirements, limitations or conditions upon the use of real property ***in excess of those allowed by applicable regulations in effect on the date an application for permit is filed***." RCW 64.40.010(6) (emphasis added). It is undisputed that at no time has the City made any final decision which placed requirements, limitations or conditions upon the use of Appellants' property in excess of those allowed by applicable regulations in effect on the date an application for permit is filed.

Key here is that the "applicable regulations" for City water service to Petitioners' properties are the City's codified requirements at PMC ch. 14.22 specifically, and PMC Title 14 generally. There are no other "applicable regulations" for water service to their properties. Even Appellants admit this in their 2006 and 2007 LUPA Petitions. Thus, because the only regulations, limitations or conditions ever imposed on their properties (as well as all other properties outside the city limits) were those in [former] PMC ch. 14.22, including the [former] annexation requirement. Appellants cannot establish that the City at any time attempted to impose regulation, limitation or condition on their property which was "in excess of those allowed by [the City's water requirements in PMC ch. 14.22]."[39]

Seventh, there was no arbitrary, capricious or unlawful act by the City which would support liability under ch. 64.40. A ch. 64.40 claim requires a showing that the City's conduct was "arbitrary and capricious,"

[39] Indeed, what is at issue here, apparently, is Appellants' dissatisfaction with one or more of the "applicable regulations" in PMC ch. 14.22 – not that the City attempted to impose conditions, regulations or limits in excess of those regulations.

or otherwise "unlawful." RCW 64.40.020(1). Arbitrary and capricious conduct is defined as a "willful and unreasoning decisions made without regard for facts and circumstances." *Saben v. Skagit County*, 156 Wn. App. 869 152 P.3d 1034 (2006). Not only does the objective and undisputed record belie any such showing here, but Appellants' failure to obtain relief under LUPA does as well. The Hearing Examiner's August 7, 2007 decision was in favor of the City (and County); the City (and county) prevailed, and the Examiner held that he had no authority "to require the City of Puyallup to provide water service to [Petitioners'] site," and that Appellants' "request to compel the City of Puyallup to provide water service to [Petitioners'] site is ***denied***, because the Hearing Examiner does not believe he has the power to order that remedy." CP 15-16. While Appellants did challenge that decision under LUPA – as the law allowed them to do – they failed to obtain relief or to overturn the Examiner's decision. The Court's LUPA decision (the September 12, 2008 Order) was in favor of the City – upholding the Examiner's decision, affirming the August 7, 2007 decision of the Pierce County Hearing Examiner to wit: The Pierce County Hearing Examiner does not have the power to compel the City of Puyallup to provide water service to Petitioners' property." CP 667, ¶ 1.

The Examiner's Decision, as well as the Court's September 12, 2008 Order are verities, time-barred and the law of the case.[40] Both decisions are

[40] Notwithstanding the finality of the Examiner's decision and the bifurcated parts of the Court's Order, Appellants' failure to follow through on the remand part of the Order, has rendered any remand an impossibility since the Examiner no longer has jurisdiction to entertain any appeals of or issues regarding water service.

in favor of the City (and County) and mandate dismissal of the ch. 64.40 claim. *See, e.g., Habitat Watch*, 155 Wn.2d at 407 (illegal decision that was never challenged under LUPA became final). Because the City's actions/decisions are now deemed lawful, valid and final, and are no longer subject to challenge or further review, Appellants as a matter of law cannot meet a condition precedent to liability: That some final "permit" decision by the City (assuming there ever was one) was "arbitrary, capricious, unlawful, or exceeded lawful authority." RCW 64.40.020(1).

Eighth, Appellants' request for water service does not meet the statutory definition of a "permit." RCW 64.40.010(2) defines a "permit" as "***any governmental approval required by law before an owner of a property interest may improve, sell, transfer, or otherwise put real property to use***."[41] (Emphasis added.) Here, Appellants are already using

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[41] Courts strictly construe definitions in RCW ch. 64.40. *See, e.g., Birmbaum v. Pierce County, supra*. The *Manna Funding v. Kittitas County*, 173 Wn. App. 879 case is instructive and supports a conclusion that "a request for water service, or change in water service, does not meet the statutory definition of an application for a permit" under RCW 64.40.010. In *Manna Funding*, the Kittitas County Board of County Commissioners twice and unlawfully denied an application by Manna Funding for site-specific rezoning of its rural property near Roslyn. On two occasions, the trial court found that the County Commissioners' denial of the site-specific rezones were improper and vacated those denials. Both County rezone decisions were declared invalid and were remanded by the Court with direction to approve the rezone requests. *Id.* at 886. After the second LUPA decision reversing the Commissioners' rezone denial, the plaintiffs amended their complaint to plead claims for damages under RCW ch. 64.40, 42 U.S. C. § 1983, and for tortious interference with a business expectancy and tortious delay. The Court dismissed Manna's lawsuit on summary judgment and, with respect to the ch. 64.40 claim, awarded the County attorneys' fees – despite the fact that the County had lost in the two prior LUPA actions. This was affirmed by the Court of Appeals with respect to dismissal of the ch. 64.40 damage claim, because Manna's application for rezoning was not an "application for a permit" for purposes of a cause of action under RCW 64.40.020. *Id.* at 893-894. The Court noted that the permit definition in RCW 64.40.020(1) only allows recovery of damages to a property owner "who has applied for a permit to develop the property." *Id.* at 894 (emphasis added). Since a rezone was not required to "develop the property" (even

their property, they have the ability to sell or transfer their property, and have been putting it to use already. Additional water service from the City, or a change in the nature of the water service from residential to commercial or otherwise, is not a "governmental approval required by law" before they can improve, sell, transfer or otherwise put their property to use. They are already doing all of these things without additional or change in water service from the City.

Ninth, Appellants can show no damages as authorized by ch. 64.40. Damages are authorized "only for expenses and losses that are incurred ***after*** a cause of action under the statute arises," which is "when the administrative process fails to provide adequate relief." RCW 64.40.010(4) and (6), and *Brower v. Pierce County*, *supra*, 96 Wn. App at 565-566. There is no evidence of damages as would be supported by the statute's language anywhere in the extensive record before this Court.

1. The Court Properly Awarded Attorneys' Fees under RCW 64.40.020(2)

The trial court properly awarded attorneys' fees to the City for dismissal of Appellants' ch. 64.40 damage claim. *See*, CP 2574-2590. The City was the prevailing party on Appellants' ch. 64.40 damage claim and as such was entitled to an award of fees and costs. RCW 64.40.020(2); *Callfas v. City of Seattle*, 129 Wn. App. 579, 598, 120 P.3d 110 (2005) (awarding

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though it may help increase the value of it), the Court held that it did not meet the definition of a "permit" and, therefore, Manna lacked standing to bring a claim under ch. 64.40. *Id.* Thus, because Manna "did not file an 'application for a permit' giving rise to a cause of action for any 'act' of the County and of the statute," it lacked standing to sue under ch. 64.40, its claim had to be dismissed; and the County was entitled to attorneys' fees under RCW 64.40.020.

fees to the defendant as prevailing party on RCW ch. 64.40 claim). If the Court believes that the trial court's July 20, 2015 Findings and Order was improper, or that there is some factual issue concerning that 2016 decision and that the absence of property owner Doris Mathews did not invalidate these orders, then the Court should affirm the June 21, 2013 SJ Order and the September 10, 2013 Reconsideration Order.

D. Response to Appellants' Challenges to the Trial Court's December 13, 2013 Fee Order and December 13, 2013 Final Judgment[42] (Dec. 30, 2013 *Second* Notice of Appeal)

The Trial Court properly awarded the reasonable attorneys' fees and costs under RCW 64.40.020(2). The City was entitled to the $132,790.65 fee award because: (1) it was the prevailing party on Appellants' near-frivolous ch. 64.40 damage claim, (2) the fees were well supported by substantial evidence which was mostly un-challenged, (3) the Court carefully and thoughtfully considered the request, actually lowered the amount requested by the City, and (4) because the Court made detailed, crafted findings to support the $132,790.64 fee award. CP 2574-2590.

First, the City was the prevailing party on Appellants' ch. 64.40 damage claim and as such was entitled to an award of fees and costs. CP 1141-1144. RCW 64.40.020(2). The statute provides as follows:

> The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

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[42] Copies of this order and related judgment (CP 2574-2590 and 2591-2592) are attached as Appendices E and F.

RCW 64.40.020(2). *See, also, Callfas v. City of Seattle*, 129 Wn. App. 579, 598, 120 P.3d 110 (2005) (awarding fees to the defendant as prevailing party on RCW ch. 64.40 claim); and *Manna Funding LLC v. Kittitas County*, *supra.*

Second, the extensive and detailed record by the City's attorneys fully and properly detailed the nature of the work done, the hourly rate of the attorneys, the time spent, the work's relationship to the ch. 64.40 fees, and the basis for the fees. *See*, CP 2022-2183. The Court held several hearings on the City's fee request, carefully considered Appellants' contrary arguments and limited opposition evidence, made tailored findings and conclusions, and properly detailed the $132,790.65 award . This amount is less than what the City requested. *See, e.g.* CP 2578, 2588-2590.

If the Court believes that the trial court's July 20, 2015 and April 15, 2016 Findings and Order was improper, or that there is some factual issue concerning that 2016 decision, and that the absence of property owner Doris Mathews did not invalidate the prior Court orders and decisions, then the Court should affirm the December 13, 2013 Fee Order and the Judgment.

E. Response to Appellants' Challenges to the Trial Court's July 20, 2015 Findings, Conclusions and Order[43] (Aug. 17, 2015 [Errata] *Third* Notice of Appeal)

The trial court held in its *Findings of Fact, Conclusions of Law and Decision Following Remand Hearing, and Order Granting City of Puyallup's Motion to Vacate and Motion for Summary Judgment and Dismissing Case With Prejudice* ("Summary Judgment Order"), that "all

[43] A copy of this order (CP 3409-3421) is attached as Appendix G

decisions, orders and judgments—are **VOID AB INITIO**" (CP 3420) from Doris Mathews' death on December 8, 2009 through the date of the Order. This "includes specifically and without limit the Court's June 21, 2013 Order Granting Summary Judgment (the subject of Petitioners/Plaintiffs' first appeal) and the December 13, 2013 Final Judgment (the subject of Petitioners/Plaintiffs' second appeal)." CP 3420 (emphasis in original).

In this same Order, the trial court granted the City's Motion for Summary Judgment on the basis that "because there is an absence of a necessary and indispensable party to this action—the Estate of Doris E. Mathews which holds a 75% interest in the subject property—there is no legal relief this court can grant, and no authority to allow this matter to proceed." CP 3419.

Appellants are appealing from this Order, but it is unclear the exact relief they seek. Appellants state at p. 58 of their Brief that the Court erred in granting the Motion for Summary Judgment on the following bases: 1) that Plexus/Spice possessed the authority to prosecute the appeal; 2) while CR 25 addresses a process upon the death of a party, under the facts of this case, no singular burden to act is imposed on co-Petitioners of the deceased party; 3) upon Ms. Mathews passing her former legal counsel lacked authority to act on her behalf, and the duty fell on the Estate which failed to act; 4) out of jurisdiction cases relied on by Puyallup to characterize the appeal as moot don't apply in Washington where CR 25 governs (no argument of any kind in support of this issue); and 5) neither Puyallup's

reading of LUPA or Ch. 64.40 RCW applies to defeat this case in any way.[44] However, it is unclear whether the Appellants are also contesting that the trial court voided the 2013 Orders in error. Regardless, the City will address each of the Appellants' arguments, which fail for the reasons set forth below. Appellants have given this Court no basis upon which to overturn the trial court's rulings, and this Court should affirm in its entirety the Court's Summary Judgment Order.

1. Appellants Fail to Cite Any Legal Authority In Support of Their Argument on this Order

As a preliminary matter, the City asks the Court to take note that Appellants do not cite one case in support of their argument on pages 58-65 of their Amended Brief that the Estate should have been ordered to join the litigation and that the litigation could continue without the Estate. "According to RAP 10.3(a)(5), citations to legal authority and reference to relevant portions of the record ***must*** be included in support of issues raised on appeal.... Without adequate, cogent argument and briefing, this court should not consider an issue on appeal." *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990) (emphasis added). No authority has been cited by Appellants, and for that reason alone, their appeal of this *Order* should be dismissed.

Additionally, on pages 65-68 of their Brief, Appellants fail to point to one case which supports their position that summary judgment should not

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[44] Again, many of Appellants' claims relating to this Order are in violation of RAP 10.3(a)(6) and, therefore, do not merit this Court's consideration. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2013).

have been granted in favor of City, and instead only argue that the City's authority was decided pre-LUPA. Again, Appellants do not cite to any case law which allows this cause of action to survive without the Estate—a 75% property interest owner—as a part of the litigation. And, Appellants have assigned error to 18 findings of fact and conclusions of law in the July 20, 2015 Order, yet have not specifically contested any of these findings. They should be treated as verities on appeal. *See, Lint, supra.*

In their briefing before this Court, just as they did at the trial court, Appellants and their counsel ignore the key issue—the fact that counsel was legally unable to continue to represent Doris Mathews after her death, yet continued to do so. This is what required the trial court to vacate all Orders/Judgments entered after Ms. Mathews' death on December 8, 2009, and assessing CR 11 sanctions. Attorney Lake never has given an explanation as to why she did not inform the trial court of this fact upon Ms. Mathews' death. Further, after Ms. Mathews' died, the Estate was a necessary party to continue the litigation. Without the Estate, dismissal was proper, and should be affirmed by this Court.

2. The Orders Entered Following Ms. Mathews' Death (including the 2013 Orders) and Before the Trial Court was Made Aware of her Death had to be Voided by the Trial Court Because Appellants' Counsel no longer had authority to Represent her.[45]

"The death of a client terminates the lawyer-client relationship, and the lawyer for the deceased party may no longer represent the decedent's

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interests. The lawyer may not act further in the matter unless expressly authorized to do so by the deceased client's successors." 15A Washington Practice § 36.2 (2014) (emphasis added). *See also, Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 18, 985 P.2d 391 (1999).

Washington law is further buttressed by out-of-state case law. "The attorney's agency to act ceases with the death of his client, see Restatement (Second) of Agency § 120(1) (1958), and [without a living client], he has no power to continue or terminate an action on his own initiative." *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 (4th Cir. 1985) (collecting cases). "The authority of defense counsel ... to act for [the decedent] was terminated by the death." *Cheramie v. Orgeron*, 434 F.2d 721, 725 (5th Cir. 1970).[46]

Thus, where a plaintiff who commences an action died prior to a summary judgment motion, that motion becomes null and void, and any decision from that motion becomes unenforceable. As described by a New York court with similar facts to those at issue here:

> ***Their agency as attorneys for the deceased plaintiff terminated upon his death and any subsequent actions by them on his behalf were null and void. Therefore, since no proper substitution of parties was made prior to the entry of the order denying summary judgment, that order is a nullity and this court has no jurisdiction to hear and determine the appeal.***

Bossert v. Ford Motor Co., 528 N.Y.S. 2d 592, 592-593 (N.Y. App. Div.

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[46] *See, also: Bass v. Attardi*, 868 F.2d 45, 50 n. 12 (3d Cir. 1989); J. Kevin Webb, *Until Death Do We Part?: An Attorney's Responsibility After the Death of the Client*, 25 J. Legal Prof. 239 (2001) (discussing the impact the death of a client has on the obligations of his former counsel during the litigation process). Contrary to Appellants' unsupported statement that the out of state case law is somehow not relevant, it is right on point, consistent with Washington law, and supports the City's position.

1988) (emphasis added). The court in *Campbell v. Campbell*, 878 P.2d 1037, 1043 (Okla. 1994) reached the same result (the authority of a deceased party's attorney ceases upon the death of that party. *See also*, *Brantley v. Fallston General Hosp. Inc.*, 636 A.2d 444, 446 (Md. 1994) (holding that counsel's authority to file an appeal terminated upon the death of his client. Since no other real party in interest had been substituted, when counsel filed the appeal, he purported to be acting on behalf of a non-existing client).

Appellants argue that CR 25(a) eviscerates the City's argument that CR 19 applies, but they provide no law in support of this argument, and it should be disregarded. Further, there is ample support that CR 19 does apply and the failure to join the Estate of Mathews in this litigation is fatal to Appellants' claims. Under CR 19, the trial court undertakes a two-part analysis to determine whether a party is indispensable to a particular cause of action: First, the court must decide whether a party is necessary for the adjudication, and, second, when an absent party is necessary but cannot be joined, the court must determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008). The trial court refused to mandate that the Estate of Doris Mathews be joined in this litigation as an involuntary plaintiff. Appellants have made no argument that they should be joined involuntarily. Appellants ask this Court to allow this litigation to proceed without a 75% property interest owner, which is counter to all case law

regarding property rights, contrary to the rules of joinder, and contrary to common sense. The trial court properly entered the Order granting the motion to vacate and subsequent motion for summary judgment and it should be affirmed by this Court on appeal.

Ms. Mathews' counsel's authority to continue representing her interests terminated at the moment she died. Thus, any actions taken after December 8, 2009 on behalf of Ms. Mathews were properly vacated.

3. The Substitution of the Estate was Necessary to Continue the Litigation, but that has Never Happened

In *Stella Sales*, after Defendant DeMay Johnson had died, Stella Sales could no longer simply proceed against her. Even though the trial in the matter had concluded, judgment had not been entered, and Stella Sales had to present proposed findings of fact, conclusions of law and judgment. To proceed, Stella Sales was required to substitute the representative of Johnson's estate under CR 25(a). The trial court followed this case law, and held as follows:

> Once Ms. Mathews died December 8, 2009, her then attorneys, Carolyn Lake and—later—associated attorney Stephen Hansen, lost legal ability to do anything for or take any action regarding Ms. Mathews or her interest in the subject property in this litigation. Accordingly, when Ms. Mathews died, the attorney-client relationship between her and her attorneys, Carolyn Lake and Stephen Hansen were without authority to take any action or do anything in the case regarding her claims or her interest in the subject property.

CP 3418.

When a party dies after commencement of suit, CR 25(a) governs

the substitution of the "successors or representatives" of the deceased party.

> (a) Death. (1) Procedure. If a party dies and the claim is not thereby extinguished, the court ***may*** order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided by rule 5 for service of notices, and upon persons not parties in the manner provided by statute or by rule for the service of a summons. If substitution is not made within the time authorized by law, the action may be dismissed as to the deceased party.
>
> (2) Partial Abatement. In the event of the death of one or more of the plaintiffs or of one or more of the defendants ***in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record*** and the action shall proceed in favor of or against the surviving parties.

CR 25(a)(1) & (2) (emphasis added).

When a party to a lawsuit dies, the cause of action survives, but the action must be continued by or against the deceased party's representatives or successors in interest. *Stella Sales*, 97 Wn. App. at 18-19. Furthermore, the attorney for the deceased party may no longer represent her interests. Here, Appellants admit that their counsel lacked authority to act on behalf of Doris Mathews, yet that same counsel offers no explanation as to why she continued to represent Mathews in the litigation. Here, Ms. Lake purportedly continued to represent all of the Plaintiffs in this action: to this day, she never filed a notice of withdrawal on behalf of Doris Mathews or otherwise indicated that she no longer represents her.

4. Appellants and their Counsel—*Not the Estate*—Had the Obligation to Seek Substitution Following Ms. Mathews Death, and the Lawsuit Could Not Continue Under the Partial Abatement Provision of CR 25(a)(2)

Appellants argue that they had no duty under CR 25 to disclose to the Court that Ms. Mathews had passed away and only needed to "suggest" it on the record after an adverse ruling had been entered against the Estate. No caselaw supports Appellants' position. In fact, CR 25 itself and the governing caselaw points to the death of a client being suggested on the record immediately after it happens. Ms. Lake has no explanation as to why she never disclosed Ms. Mathews' death at the earliest possible juncture.

In this case, the lawsuit could not continue under the partial abatement provision of CR 25(a)(2) because the Estate of Doris Mathews refused to join in the litigation and it is a necessary party. The Estate of Doris Mathews is a current owner of the property (75%), along with Ted Spice (25%), and the Estate's interest in the property was not transferred to Ted Spice and/or Plexus under any right of survivorship or other means. Therefore, the Estate must be made party to the lawsuit in order for it to continue. As held by the Trial Court and supported by the Declaration of Donna DuBois (the P.R. of the Estate), "the litigation cannot proceed without the Estate in this case, and the Estate refuses to join in the litigation and wants no part of it. Additionally the Court is without authority and cannot compel the Estate to be a party to this litigation against its wishes." CP 3418-3419, ¶29. Appellants cannot point to one case or any authority which compels the Estate to join in the litigation. And, the Appellants fail

to provide this Court with any authority in support of their clam that Spice and Plexus had the ability to continue the appeal without Mathews.

While throwing their former client, Ms. Mathews, fully "under the bus" by wrongly blaming her Estate for not intervening and substituting for her, attorney Lake claims she did all that was required of her by "suggesting her death on the record" by putting a cryptic footnote in a notice of appeal that Ms. Mathews was "now deceased" nearly four years after her death!

Attorney Lake was Ms. Mathews' counsel from the outset. Her death should have been put on the record of this Court promptly after her death – early 2010. But, Ms. Lake did nothing and said nothing, and to date, continues to accept no responsibility for her omission.[47]

CR 25 requires that "Death ***shall*** be suggested upon the record." (Emphasis added.) Mr. Spice and Attorney Hansen admittedly knew Doris Mathews was dead as of 2010, since they initiated a lawsuit against Mathews' Estate. Her death should have been suggested upon the trial court record at that time. Instead, the Appellants and their counsel continued the charade of Ms. Mathews as a Plaintiff in this action, without so much as a

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[47] Ms. Mathews' death could have been entered into the trial court's record when Mr. Hansen first represented Mr. Spice in litigation against the Estate. But he and Ms. Lake did nothing and said nothing. Even later they could have suggested death when they approached the City to settle this litigation, in late 2012. Again, the attorneys did nothing and said nothing. Even later, they could have suggested her death in the Spring of 2013, before they (1) sought a trial date, (2) defended against the City's summary judgment motion (which the City won), (3) before they filed a reconsideration of the summary judgment order, (4) before they defended against the City's RCW Ch. 64.40 fee request (which they lost), or (5) before they sought filed a reconsideration of that fee order. Again, they did nothing and said nothing. At the very latest, and although still highly prejudicial, the attorneys could have suggested Ms. Mathews' death on the record before allowing a nearly $133,000 judgment to be entered against her. Once again, they did and said nothing.

hint of Ms. Mathews' death to this Court or the Defendants (City and Pierce County). The majority of the proceedings in this case did not take place until 2013, nearly four years after Ms. Mathews' death.

Even if this Court was to take as truth everything Appellants have claimed, any substitution of parties must have been made by the trial court, not unilaterally in an obscure footnote in a notice of appeal filed after the trial court proceedings had concluded. There was no obligation on the Estate to substitute into this lawsuit. That burden would only fall upon a defendant in an action,[48] not a plaintiff. Ms. Mathews' Estate has the choice of whether to proceed with this litigation and they refuse to be a part of it. CP 3622, ¶ 14. Appellants and their counsel continue to fail to explain their actions as to why a dead woman was represented by them nearly four years after her death, and without a hint of her death to this Court or the Defendants.

5. The Durable Power of Attorney Allegedly Executed by Mathews did not Alter the Ownership of the Property, and Provides No Basis for Spice to Act for Her to Bind the Property

As they did at the trial court, Appellants rely on a questionable – and revoked – Durable Powers of Attorney (DPOA) allegedly executed by Ms. Mathews while she was alive. Again, the July 20, 2015 Order made it clear that "once Ms. Mathews died December 8, 2009, her then attorneys lost legal ability to do anything for or take any action regarding Ms. Mathews or her interest in the subject property in this litigation."

[48] RCW 11.40.110 only applies to defendants in an action. There is no obligation on a personal representative of a plaintiff in an action to substitute and continue the action. Here, the Estate does not want to continue this litigation.

CP 3418. The Appellants' continued reliance on these DPOA documents is a complete red herring. Further, this reliance is not only factually and legally unsupported; it continues to blatantly misrepresent facts to this Court.

First, all DPOAs purportedly executed by Ms. Mathews before she died were expressly rescinded by her on February 6, 2007 – over six months before this lawsuit was filed. CP 4024, 4029-4030. There is absolutely no evidence that this rescission was itself ever revoked or modified, or that Ms. Mathews ever executed a subsequent DPOA in favor of Spice. This is the last and controlling document, and it makes clear that Ms. Mathews did not want Mr. Spice to do anything for her or on her behalf after February 6, 2007. Thus, as of this date, all prior DPOAs and all other agency documents were unequivocally revoked and of no legal effect when she wrote: "***I no longer desire Ted M. Spice to be my attorney-in-fact***." *Id.*

Second, as if the revocation (above) is not enough, also on February 6, 2007, Ms. Mathews executed a separate DPOA unequivocally declaring her daughter – Donna Dubois – to be her exclusive "attorney-in-fact."[49] CP 4032-4036.

Third, notwithstanding the above, the law is clear that upon death, any purportedly valid DPOA in favor of Spice was automatically terminated. RCW 11.94.010.[50] "It may be accepted as a general rule that the death of the principal terminates the agency." *Valentine v. Duke*, 128 Wash.

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[49] This DPOA is unchallenged and fully consistent with Mathews' recession of the earlier DPOAs in favor of Mr. Spice. There is no evidence this DPOA was ever revoked, rescinded or modified.

[50] An agent may only continue to operate under a DPOA if there is uncertainty as to a principal's death. Here, there was no such uncertainty.

128, 131, 222 P. 494 (1924). Thus any actions taken by Spice in this lawsuit purportedly with authority under the DPOA following Ms. Mathews' death were null and void, since a different legal entity—the Estate—held Ms. Mathews' property interests as of December 9, 2009.

6. The LLC Operating Agreement Does Not Alter the Ownership of the Property, and Provides no Basis for Spice to Act for Ms. Mathews or Bind the Property

Appellants also heavily rely on the Plexus "Investments," LLC Operating Agreement, as authority to continue this lawsuit, but the document has no legal bearing on this case, for many reasons. First, it is an agreement of an entity that is not party to this lawsuit. The business entity defendant in this case is Plexus "Development" – not "Investment." These are two different entities. Plexus "Investments" has never been a party to this litigation.

Second, as noted by Pierce County Superior Court Judge Hickman in the probate trial, the Operating Agreement, even though for a different entity than the Defendant herein, itself is of "questionable validity."[51]

Third, even if it were a party to this lawsuit, which it is not, Plexus Investments currently has no ownership interest in the subject property; thus any Plexus "Investments" Operating Agreement has no legal effect. CP 3668-3675.

Fourth, "***a person is dissociated as a member of a limited liability***

[51] For this reason alone, the document has no application to the facts here, does not actually recognize any prior, purported authority of Mr. Spice to act for or on behalf of Ms. Mathews while she was alive, and it should be disregarded.

company upon the occurrence of one or more of the following events: (a) The member dies...RCW 25.15.131(1)(a) [emphasis added]. Upon her death Ms. Mathews was no longer a member of the LLC and Mr. Spice no longer had authority to act in her interest under any LLC agreement.

Fifth, the Agreement itself provides by its own terms that it "shall be binding upon and inure to the benefit of the parties" and to "... their respective heirs, legal representatives, successors and assigns." CP 2901, ¶12.7. Again, upon Ms. Mathews' death, all of her ownerships, investments, and control of the subject property inured to her successor and assign – her daughter, the PR of her Estate.[52]

7. Appellants' Reliance on the DPOA, the LLC Operating Agreement and the Promissory Note are Contrary to Representations in the LUPA Petition and Complaint

If Mr. Spice had all of the authority he needed to control this litigation, to control the subject property, to bind the property to a judgment, and to take actions on behalf of Ms. Mathews through a DPOA, an LLC operating agreement, or the alleged promissory note, Appellants have no answer to the question why they originally made Ms. Mathews a plaintiff in this action in the first place, and why in their *LUPA Petition and Complaint* (CP 2) they identified her as the (sole) owner of the subject property. And, they have no answer to the question of why – with all of this claimed authority to bind, act and control the property – they made no mention

[52] It is indisputable that since September 7, 2012, the Estate has had a 75% interest in the property. The LLC was awarded no part of the property, and Spice individually was only awarded a 25% interest. This jury award has been affirmed by this Court.

whatsoever of this authority in that pleading. The claimed documents (DPOA, operating agreement, note, etc.) were all allegedly in existence when Appellants filed their LUPA Petition and Complaint on August 29, 2007. Either Appellants have misrepresented Mr. Spice's authority under all of these documents (which is likely), or they violated Rule 11 by misrepresenting Ms. Mathews' status and failing to disclose all of this when they signed and filed the LUPA Petition and Complaint in August, 2007. Further, all of this was before the trial court before deciding the Motion for Summary Judgment, and the trial court found that the lawsuit had to be dismissed without Doris Mathews' Estate's participation.

8. All Property Owners Must be Part of Litigation Affecting Real Property

The law in Washington is clear: All persons holding an ownership interest in real property must be joined in legal proceedings relating to the use, enjoyment or damages relating to that property. The absence of one of several "co-owners" of property deprives the court of authority to render a decision affecting the property or to providing relief to some, but not all, co-owners. This is true under LUPA and RCW ch. 64.40.

a. Clear Case Law Requires all Owners to be Joined.

As the State Supreme Court has noted:

> Numerous Washington decisions hold that the owner of property directly affected by a land use decision or a person with an interest in the property which is the subject of the land use decision is a party to be joined in writ proceedings involving that decision. *E.g., South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 70 (1984) (property owners in a plat dispute); *Cathcart–Maltby–Clearview*

> *Community Council v. Snohomish County*, 96 Wn.2d 201, 207 (1981) (property owners affected by rezone); *Nat'l Homeowners Ass'n v. City of Seattle*, 82 Wn. App. 640, 643–44, (1996) (property purchaser and project developer); *Woodward v. City of Spokane*, 51 Wn. App. 900, 903 (1988) (same); *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 5, (1992) (neighboring lot owner who had legal right to park on affected lot); *Veradale Valley Citizens' Planning Comm. v. Board of County Commr's*, 22 Wn. App. 229, 232–33 (1978) (successful property owner-applicant); *Andrus v. Snohomish County*, 8 Wn. App. 502, 503 (1973) (grantee of conditional use permit).

Crosby v. County of Spokane, 137 Wn.2d 296, 305-306, 971 P.2d 32 (1999).

"Generally, a landowner is an indispensable party in a case that would affect the use of the landowner's property. Muslim America owned the property and buildings at issue, and it was the sole entity that could seek the exemption from the town council under RCW 19.27.042, to use the shed as a residence. Therefore, Muslim America was properly joined as a necessary party." *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 341, 314 P.3d 729 (2013).

Washington courts have consistently held that all property owners are necessary and indispensable parties in land use cases. *See, e .g., Nat'l Homeowners Ass'n v. City of Seattle*, 82 Wn. App. 640, 643–44, 919 P.2d 615 (1996); *Waterford Place Condo. Ass'n v. Seattle*, 58 Wn. App. 39, 42, 791 P.2d 908 (1990). As the person most affected in any review proceeding, the landowner is an indispensable party in land use cases, "the purpose of which is to invalidate or otherwise affect the use of his property." *Nolan v. Snohomish County*, 59 Wn. App. 876, 880, 802 P.2d 792 (1990), *rev. denied*, 116 Wn.2d 1020 (1991). *See also, Mood v. Banchero*, 67 Wn.2d 835, 410 P.2d 776 (1966); *Cady v. Kerr*, 11 Wn.2d 1, 118 P.2d 182, 137

A.L.R. 713 (1941); *Trans–Canada Enters., Ltd. v. King County*, 29 Wn. App. 267, 628 P .2d 493, *rev. denied*, 96 Wn.2d 1002 (1981).[53]

Appellants have not offered any authority upon which summary judgment dismissal should be overturned. The City has provided this Court with a litany of law upon which to uphold the ruling, and Appellants have not one case upon which to argue for reversal.

9. The LUPA Requires all property owners be made a party to the Petition

Appellants completely ignore the requirements of the LUPA statute, which governs the initiation and maintenance of a LUPA Petition. LUPA requires in pertinent part:

> (2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served ***on the following persons who shall be parties to the review of the land use petition***:***
> (b) Each of the following persons if the person is not the petitioner:
> (i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit

[53] Washington is not the only state with the established law holding that all persons with an ownership interest in real property must be joined in legal proceedings relating the use, enjoyment or damages relating to that property. Virtually every other state addressing this issue follows the same rule. *Bell v. Twp. of Spring Brook*, No. 2253 CD.2012, 2013 WL 3481860, at *8 (Pa. Commw. Ct. July 11, 2013) (holding that "Pennsylvania courts hold that property owners are indispensable parties to lawsuits affecting their property rights"); *CCS Investors, LLC v. Brown*, 977 A.2d 301, 321–25 (Del. 2009) (holding that "the owner of land that is the subject of a decision of a municipal board of adjustment is a necessary party that must be joined in an appeal of that decision."); *Commonwealth v. Maynard*, 294 S.W.3d 43, 46 (Ky. App. 2009) ("In this case, the Commonwealth not only failed to name Maynard's heirs as parties to this appeal, but also specifically named Maynard, who is deceased, as the sole Appellee. As noted by Appellee, deceased parties generally have no standing to litigate before any court.")
"The absence of the other affected property owners renders the trial court's judgment on those issues void." *Allbritton v. Dawkins*, 19 So.3d 241, 244 (Ala. Civ. App. 2009).

or approval at issue; and
(ii) ***Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue***;

RCW 36.70C.040(2) (emphasis added). LUPA requires that that each person identified by name and address as an owner of the property must be made parties to a LUPA Petition, and shall be parties to the review of the land use decision.

Under Appellants' position, the LUPA statute "only speaks to requirements when the Petition is initially filed with the superior court." *Brief*, at 68. Under that flawed logic, a party need only own the property at the time the Petition is filed, and can then immediately transfer the property to a different party and continue to enforce the rights of that new party through the existing LUPA action. This is contrary to the plain language of the statute, and additionally the balance of equities would mandate extinguishing the LUPA claim at the time the property is sold or changes ownership for any other reason.

At the time of entry of the July 20, 2015 *Summary Judgment Order*, and as now affirmed by this Court on Spice's Estate litigation appeal, the Estate has a 75% ownership interest in the property, and this fact cannot be ignored regardless of how much Mr. Spice and his counsel attempt to do so. It is Mr. Spice and Ms. Lake who are attempting to create new law, not the City.

10. Ch. 64.40 also Requires all Owners to be parties to the Lawsuit.

Additionally, under chapter 64.40 RCW, all property owners must

be joined to provide relief. "RCW 64.40.020 is clear. ***Owners*** of a property interest who have filed an application for a permit may have a claim under RCW 64.40.020." *Westway Const., Inc. v. Benton County,* 136 Wn. App. 859, 866, 151 P.3d 1005 (2006) (emphasis added). Similar to the LUPA analysis, ch. 64.60 makes clear that the owner – or owner**s** – of the property holds the key to the cause of action.

The statute clearly requires all property owners to request relief; one of several owners alone is not sufficient to confer standing. RCW 64.40.020. "The primary rule of statutory construction is to give effect to the legislature's intent. If a statute's language is clear, its plain meaning must be given effect without resort to rules of statutory construction" *Westway Const., Inc.*, 136 Wn. App. at 866. "Statutes are interpreted so that all language is given effect and no portion is rendered meaningless or superfluous." *Manna Funding, LLC v. Kittitas County, supra,* 173 Wn. App. at 890. Here, ch. 64.60 RCW is clear – it says "Owner**s** of a property interest…" *Id.* Under Appellants' strained reading of the statute, the word "owners" would be rendered meaningless.

Appellants cannot provide this court with any law in support of their position that under both Ch. 64.40 RCW and the LUPA, a minority property owner can proceed with a lawsuit affecting the property when the majority property owner refuses to participate. The *Manna Funding* case cited by Appellants certainly does not support this proposition. Additionally, that case is not on point since the Court there held that the plaintiffs did not have a valid ch. 64.40 RCW claim.

Appellants' ch. 64.40 RCW claim extinguished at the time of Ms. Mathews' death – and her Estate's refusal to participate in this litigation mandates affirmation of dismissal of the Complaint.

F. Response to Appellants' Challenges to the Trial Court's April 15, 2016 CR 11 Sanction Order[54] (April 15, 2016 *Fourth* Notice of Appeal)

The trial court entered *Findings of Fact, Conclusions of Law and Order Granting City of Puyallup CR 11 Sanctions Against Attorney Carolyn Lake*, on April 15, 2016, holding that the City was entitled to CR 11 Sanctions for Ms. Lake's conduct in not disclosing Ms. Mathews' death to the trial court at the time she passed away. The Court made a number of findings of fact, including: "Attorney Lake's actions following the death of Doris Mathews, without advising the Court or Defendants of her client's death, were advanced without reasonable cause or inquiry within the meaning of CR 11." CP 7474. The Court continued and made an additional 11 sub-findings supporting this, CP 7474-7475, which further buttressed the fact that the pleadings filed by Ms. Lake after the death of Ms. Mathews were "not based upon reasonable inquiry," "not well-grounded in fact and without legal effect," and "without basis in fact or law." CP 7475.

In appealing from this Order, the Appellants argue that two viable Petitioners remain, that the Order inaccurately described the ownership of the subject property, that the Order erred in claiming that Petitioners' counsel failed to disclose why pleadings were filed after Mathews' death;

[54] A copy of this order (CP 7460-7479) is attached as Appendix H.

that Petitioners' noting the passing of Ms. Mathews on the record was timely, that the City failed to provide the legal basis upon which Appellants should be sanctioned, and that the law does not support the CR 11 Order.[55] Each of these arguments fails.

Appellants' claims that "two viable Petitioners remain" and issues regarding the ownership of the property are red herrings, since they were not the basis of the Trial Court's CR 11 fee award. The fact that counsel never informed the Trial Court or Defendants that Ms. Mathews was dead, and continued to file baseless pleadings representing a dead woman, were the reason for the imposition of CR 11 sanctions. Ms. Lake has consistently failed to recognize that this was the basis of the sanctions, and again fails to acknowledge it in her Brief.

1. An Abuse of Discretion Standard Applies to the Award of CR 11 Fees and Costs

An abuse of discretion standard applies to the trial court's CR 11 Fee Award. Appellants ignore that an extremely high burden is on them in this appeal, not on the City as they claim at pp. 81-82 of their *Brief*. The trial court already found that the City met its burden on the CR 11 Motion for Sanctions, and Appellants must show that this fee award was a manifest abuse of discretion.[56] They fail to do so.

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[55] Just as in their argument opposing the entry of the July 20, 2015 Order, pages 68-80 of the *Amended Opening Brief* are completely devoid of any caselaw in support of Appellants' claims. As conclusory argument, in violation of RAP 10.3(a)(6), and, therefore, do not merit this Court's consideration. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2013).

[56] "This Court [Division II Court of Appeals] has uniformly adopted the abuse of discretion standard of review for CR 11 determinations. ***A trial court abuses its discretion when its***

2. The Trial Court Properly Found that Attorney Lake's Actions Violated CR 11, Since Ms. Lake Failed to Inform the Court of Her Client's Death, and Continued to Litigate the Case Without her Client's Authority

The award of fees was not based on whether Ted Spice had the "authority to act;" rather, the CR 11 fee award was granted on the basis that Appellants' counsel continued to represent a dead woman for four years and allowed orders to be entered against her, including a large fee award, even though she had died four years prior.[57] Counsel failed to inform the Court of her death, and to this day still has not provided the trial court or the City an answer as to when she knew Ms. Mathews had died.

a. **The amount of the Fees Awarded was Proper.** Judge Nevin held three hearings on the CR 11 Motion, and painstakingly analyzed the record and conducted his own research on CR 11, including researching multiple cases and secondary sources, along with consulting with many colleagues on the matter. RP December 11, 2016, pp. 6-9. He prepared a 19-page order with detailed findings and conclusions. The City requested sanctions against both attorney Hansen and Plaintiff Spice based upon the fact that they were well-aware that Mathews had died in 2009,

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order is manifestly unreasonable or based on untenable grounds." *Watson v. Maier,* 64 Wn. App. 889, 896, 827 P.2d 311 (1992) (emphasis added). *See, also*, *State ex rel. Quick-Ruben v. Verhare,* 136 Wn.2d 888, 903, 969 P.2d 64 (1998) (appropriate standard regarding sanctions under CR 11 is abuse of discretion). Additionally, "the trial court retains broad discretion as to the nature and scope of the award, which can include the full amount of attorney's fees." *Watson*, at 898.

[57] In its 19-page Order granting the Fee Award, the Trial Court made 44 findings of fact (not including subparts) and 7 conclusions of law. CR 7460-7479. Appellants state that they are challenging 27 findings of fact, yet they do not specifically analyze and challenge any of them. Because of this failure to analyze the specific findings, they must be treated as verities on appeal. *See, Lint*, 135 Wn.2d at 533.

since Hansen represented Spice in litigation against Mathews' Estate, and Spice himself knew of Mathews' death since he initiated the litigation. Judge Nevin did not impose sanctions against Hansen on the basis that "Mr. Hansen never really purported to represent Ms. Mathews." RP 23:3-4, December 11, 2015 hearing. Nor did the Court find a basis to impose sanctions against Mr. Spice, because this was "not a lawsuit by which information derives from the client, but rather a lawsuit in which halfway during its course one of the parties dies and counsel doesn't allow the court to know or doesn't tell the court." *Id.* at 28:15-18.

The Court did impose sanctions against Ms. Lake since she had represented Ms. Mathews from the beginning of the litigation in 2007, and failed to notify the Court of Ms. Mathews death. *Id.* at 27.

> And as we sit here today at 3:20 pm, goodness knows how many months after this was still raised, still no explanation as to why.... And, I still don't know when Ms. Lake knew of the death of Ms. Mathews. And I've asked that question on the record. And to this point in time, I've received no response. But I'm satisfied that Ms. Lake knew, or should have known, after a reasonable inquiry in 2012, particularly when Mr. Hansen associated in this case following his lawsuit against the estate of Doris Mathews that Ms. Lake knew or should have known. And this was significant. It was significant to the City. It was significant to all the litigants. It was significant to the court. It mattered. It was important. This court awarded nearly $132,000 judgment for attorney fees against a named plaintiff who was dead and had been dead for roughly four years before that award. And that dead plaintiff was jointly and severally liable for $132,000. And the bottom line is that the plaintiff's lawyer knew she was dead. This is serious. Now, I find that that was a violation of CR 11.

Id. at 27:11-28:11. The City requested sanctions in the amount of $312,181.86. CP 3577-3612. However, the trial court only granted $45,000 on the grounds that "(a) much of the work reflected in the City fee request would have been done even if Ms. Mathews' death had been disclosed promptly after she died; (b) CR 11 sanctions are not intended to be a fee recovery mechanism or fee shifting endeavor; (3) CR 11 sanctions are about deterrence; and (d) the amount awarded ($45,000) is reasonable and appropriate to cover the costs that the City did incur for work that its attorneys wouldn't have had to do if they had known that Ms. Mathews had died, and to correct the improperly entered orders and judgment." CP 7373-7374, ¶ 39. *See, also*, ¶ 40 (CP 7474).

The Court additionally held as follows:

> 40. The Court awards the City CR 11 sanctions in the amount of $45,000, which the Court finds to be a fair and reasonable amount given the nature and extent of this litigation and how far it was allowed to proceed before the fact of Ms. Mathews' death was disclosed, for Ms. Lake's failure to make a reasonable inquiry into the death of her client, Ms. Mathews, and as a sanction for deterrence. This amount is a sanction award, and not intended as attorneys' fees and costs incurred by the City for the work of its attorneys. ***
>
> 41. Attorney Lake's actions following the death of Doris Mathews, without advising the Court or the Defendants of her client's death, were advanced without reasonable cause[58] or inquiry within the meaning of CR 11, thus entitling the City to $45,000 in sanctions.

CP 7474. The Court made an additional 12 findings supporting this award

[58] The City also observes that there is seemingly an inherent conflict of interest in Ms. Lake representing Mr. Spice and Plexus along with herself in this appeal.

of fees.[59] CP 7474-7475.

Based on the governing CR 11 caselaw, and the holdings in the Court's Summary Judgment Order of July 20, 2015, each and every one of the Court's substantive decisions, orders, rulings – as well as the final judgment entered against all three original Plaintiffs jointly and severally – following Doris Mathews' death were rendered null, void and of no legal effect. All had to be vacated after hundreds of hours were spent by the City's counsel obtaining favorable relief and in defending continuous baseless motions by Appellants' counsel. More significantly, all of these motions, court actions and significant attorney work would never have taken place if Ms. Lake had satisfied her legal and ethical obligations to (1) advise the trial court of the death of Ms. Mathews (a plaintiff, the majority property owner, and Lake's client), (2) advise the City's attorneys that Ms. Mathews had died, (3) refrain from initiating any legal action, motions or activity in the case following Ms. Mathews' death, and (4) moved to substitute the Estate for Ms. Mathews. Inexplicably, Ms. Lake did none of these things. Instead, she continued to vigorously litigate this case as if Ms. Mathews were alive and as if she remained her client. She signed each and every pleading without any indication that Ms. Mathews was dead, and she signed each and every pleading as if she was still representing Ms. Mathews

[59] The City does not dispute that Spice has a 25% interest in the subject property. The City does not dispute that Carolyn Lake could continue to represent Spice's interests – but his interests are not the Estate's interests, and the Estate is the majority (75%) owner of the property. The CR 11 award was based upon the failure by counsel to inform the Court of Doris Mathews' death and that the litigation continued with her as a named Plaintiff represented by this same counsel, and the fact that this continued for four years before either the trial court or the City was notified.

when, under established law, she had absolutely no right to do so.

There was nothing preventing Ms. Lake from advising the Court of Ms. Mathews' death – which she knew of – advising the City's attorneys of the death, holding off on litigation following her death, and contacting the P.R. for the Estate and seeking to have the Estate substituted for Ms. Mathews. Worse, the attorneys for Appellants actively sought to settle with the City at a time when they knew that their client, Ms. Mathews, was dead. They falsely led the City's attorneys to believe they were negotiating on behalf of all three Plaintiffs. CP 3736.

The foregoing and undisputed conduct is egregious, utterly unjustified, and has unnecessarily caused significant expense to the City of Puyallup. It has resulted in a massive amount of unnecessary time and litigation and wasted the trial court's (and this Court's) valuable time and limited judicial resources. It is difficult to conceive of a more egregious set of facts justifying imposition of CR 11 sanctions against a party and that party's attorneys.

3. CR-11 Sanctions were Proper for Counsel's Conduct in not Informing either the City or the Court that Doris Mathews had died and Continuing to Litigate the Action

CR 11 authorizes a trial court to impose appropriate sanctions if a party's filing is not well grounded in fact, or not warranted by existing law or a good faith argument to alter existing law. *Lee v. Kennard*, 176 Wn. App. 678, 691, 310 P.3d 845 (2013). Rule 11 provides in pertinent part:

The signature of a party or of an attorney constitutes a

> certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, ***formed after an inquiry reasonable under the circumstances***: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a) (emphasis added).

When imposing CR 11 sanctions, the trial court must specify the sanctionable conduct in its order. "The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994); *McNeil v. Powers,* 123 Wn. App. 577, 591, 97 P.3d 760 (2004). Here, the *CR 11 Order* specifically set forth the sanctionable conduct. CP 7460-7479. The question is whether a reasonable attorney in a like circumstance could believe his or her actions to be factually and legally justified. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220.

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Biggs*, 124 Wn.2d at 197. A filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law. *Blair v. GIM Corp.*, 88 Wn. App. 475, 482–83, 945 P.2d 1149 (1997).

As explained *supra* and *infra*, the pleadings filed in this case by

attorney Lake after the death of Ms. Mathews were indisputably not well-grounded in fact or warranted by law. For Ms. Lake to argue that there was "no offending conduct"[60] was offensive to the Trial Court's and the City's sensibilities, and should be offensive to this Court, too. The fact that all Orders following Mathews' death had to be vacated supports this holding that the pleadings filed by Ms. Lake were not well-grounded in fact or warranted by law.

A court's determination that counsel or a party violated CR 11 is a matter within its sound discretion. Here, the trial court prepared a detailed order, which outlined on CP 7473-7476 each and every way Ms. Lake violated CR 11. Again, she fails to meet her burden that the Rule 11 award was a manifest abuse of discretion by the trial court.

Once a court determines that CR 11 has been violated, the imposition of sanctions is mandatory. *Johnson v. Jones*, 91 Wn. App. 127, 135-136, 955 P.2d 826 (1998). The test for a violation of Rule 11 is based upon an objective standard. An attorney must make a reasonable inquiry before filing a pleading. Because Rule 11 requires an attorney to perform a "reasonable inquiry," the fact that an attorney made a factual misstatement in good faith is irrelevant to a court's Rule 11 analysis. "The reasonableness of an attorney's inquiry is evaluated by an objective standard." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220. *See also, Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474 (2d Cir. 1988) ("attorneys are expected to measure up to minimal standards of professional competence

[60] *Brief*, at p. 82.

under the Rule and thus may not excuse their conduct on the ground that they were acting in good faith") (citations omitted).

> Rule 11 imposes an affirmative duty on counsel to make reasonable inquiry into the viability of a pleading before it is signed. Indeed, counsel's signature is an affirmation that reasonable inquiry was in fact made ... ***Whether an attorney has complied with the requirements of Rule 11 is determined not by the apparent absence or presence of subjective good faith on the part of the attorney, but rather by the objective reasonableness of his action***. Sanctions will therefore be imposed where the court finds that, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Johnson v. Veterans Administration, 107 F.R.D. 626, 628 (N.D.Miss.1985) (citations omitted) (emphasis added).

As Appellants' counsel acknowledges, the law is clear: "***The authority of a deceased party's attorney ceases upon the death of that party***." *Campbell v. Campbell*, 878 P.2d 1037, 1042 (Okla. 1994). "The attorney cannot represent a dead person; and, upon such death, the real party in interest is the personal representative or heirs." *Id.*

Attorney Lake had absolutely no authority to proceed with the litigation following Ms. Mathews' death. CP 3418, ¶ 28, 30. Thus, every pleading she signed from December 9, 2009 through after the appeal was filed was "not well grounded in fact, or not warranted by existing law." Thus the trial court properly found a violation of CR 11 by Ms. Lake, and sanctions are mandated.

Each and every pleading, legal memorandum or other paper signed

by Appellants' attorneys on or after December 9, 2009 were not well grounded in fact (since one of the Plaintiffs was a dead person with no legal standing), nor were they warranted by any existing law. CR 11(a)(1) & (2). Notwithstanding the revisionist history she is trying to proffer to this Court, Attorney Lake signed each and every pleading on behalf of all three Plaintiffs, and never put any limiting language on her signatures on any pleading indicating that she was signing for fewer than all three Plaintiffs. Thus, aside from her breach of duty of candor[61] to the trial court in failing to advise the court or the parties that her client and primary property owner had long since died, she perpetuated a fraud on the trial court and the Defendants in violation of CR 11 by continuing to sign and file pleadings (as well as make arguments) on behalf of a dead person whom, under the law, she had absolutely had no authority to represent.

Ms. Lake was the purported attorney for Doris Mathews since the inception of this lawsuit in 2007. She had a duty to make a reasonable inquiry as to whether each pleading she signed was grounded in fact and law. Each and every time Ms. Lake submitted any pleading or any other document in this case without inquiring as to whether her client was, in fact, still alive, she violated Rule 11. Ethical duties (as well as common sense) would require that an attorney have her clients (all of them, particularly those with divergent interests to one another) review and authorize

[61] The duty of candor is a necessary corollary of the certification required by Rule 11. "A lawyer must not misstate the law, fail to disclose adverse authority not disclosed by his opponent of which he knows or should know, or ***omit facts critical to the application of the rule of law relied on***." *Pierce v. Commercial Warehouse*, 142 F.R.D. 687, 690 (M.D. Fla. 1992) (emphasis added).

documents being filed with the Court.

Between December 9, 2009 (the day after Ms. Mathews died) and December 13, 2013 (when final judgment was entered in this case), at least seven motions were noted or heard, at least four court hearings were held, hundreds of pages of briefing and evidentiary materials were submitted to this Court, dispositive and fee motions were briefed, argued and decided by the Court, and a final judgment entered. CP 3691-3696. Also during this time, Ms. Lake, filed and served notices of absence/unavailability, transmitted numerous emails to counsel for the City and Pierce County, and actively litigated the case. *Id.;* CP 3680-3681, ¶ 10. Each and every one of these actions and documents by attorney Lake were signed on behalf of a dead client without any authority by her Estate, and in violation of Rule 11.

As held by the Trial Court, each and every action Ms. Lake took on or after December 9, 2009 was not based in law or fact.

4. Appellants violated CR 11 and failed in their duty of candor toward the tribunal and not making a reasonable inquiry as to the legal basis of the pleadings they signed by not advising the trial court of Doris Mathews' death

On January 9, 2015, Judge Nevin held the first hearing after this Court remanded the matter to the trial court. At this hearing, Appellants and their attorneys argued that the 2013 fee Judgment should not be voided or altered, and essentially implied that all that was needed was a change to the caption of the pleadings to remove Doris Mathews as a Plaintiff. Judge Nevin questioned Appellants' attorneys (Lake and Hansen) as to when they learned Ms. Mathews had died. Attorney Lake's response to this question

is illuminating:

> THE COURT: Let me ask you this, when did you first learn that Ms. Mathews [Ms. Lake's client] had passed?
>
> MS. LAKE: You know, I can't recall an exact date. And, I am the last party to emulate Hillary Clinton, but I'm quoting her now, "***What difference does it make***?"

RP January 9, 2015, at 27:11-16 (Emphasis added.). "What difference does it make?" Actually, a lot. The fact of whether Ms. Mathews was alive or dead goes to the very essence of the legality of Appellants pursuing their case, as well their attorney's authority to act for Ms. Mathews. Further, this response seriously calls into question whether Ms. Lake ever spoke with or had any contact with her purported client Doris Mathews. Ms. Lake has never answered this question. And, it is notable that at no time since the death of Ms. Mathews has attorney Lake identified or produced a written engagement letter or fee agreement with Doris Mathews, or produced any billing statements or invoices to Ms. Mathews, or produced any communications or other documents from Ms. Mathews to either of them which would establish or even indicate an attorney-client relationship between her and either of the attorneys. It is seriously questionable whether any such documents exist.

Judge Nevin also questioned Appellants' attorneys as to why they did not inform the Court as to Mathews' death.

> THE COURT: Does winding up the affairs of the LLC include continuing on with the litigation and not allowing the court any information about the fact that one of the litigants is dead?

> MR. HANSEN: He's [Mr. Spice] in the middle of it at that time, your Honor. So I believe he has to go forward with the litigation
>
> THE COURT: ***And that extends to not telling the court that one of the parties is dead.***
>
> MR. HANSEN: ***I believe that is the estate's obligation, your Honor, especially with the estate's awareness of this litigation....***
>
> THE COURT: What are the obligations? I don't mean to get too far ahead here because at the moment this is a secondary question, but just out of curiosity, ***what's your take on lawyers' responsibilities in a situation like that when one of the clients is dead.***
>
> MR. HANSEN: ***I believe my duty was to Mr. Spice....***

RP January 9, 2015, at 16:22-17:20 (emphasis added). Ms. Lake echoed his contention that neither of them owed any duty to the Court to tell them their client had died. Thus, counsel for the Appellants did not believe they had any duty to inform the trial court that their own client—***the owner of the property***—had died. In fact, they continued to represent her and file documents on her behalf for nearly four years after her death.[62]

5. Ms. Lake will not – or cannot – explain her failure to advise the Trial Court of the death of her client or other egregious conduct

As held by the Trial Court, Ms. Lake has never offered <u>any</u> explanation for her failure to advise the Court or the Defendants of the death of Doris Mathews, and the record to date is devoid of <u>any</u> explanation by her as to why she never advised the trial court or the City that her client had died, or when she knew.

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[62] Attorney Hansen obviously knew Ms. Mathews was dead since he represented Mr. Spice in his lawsuit against Ms. Mathews' Estate in 2011.

Further, attorney Lake has not offered any explanation for the following:

a) Whether she had a written engagement letter, fee agreement or employment contract with Ms. Mathews to represent her or provide legal services on her behalf;
b) The date she learned that Ms. Mathews was dead[63];
c) Whether or to what extent, if at all, she had any communication (written or oral) with Ms. Mathews prior to her death;
d) How she could continue to represent a deceased client;
e) How she could file pleadings on behalf of Ms. Mathews, or make motions or defend motions on her behalf, or allow orders or judgments to be entered affecting her property and/or rights after her death;
f) Why she never revised or asked the Court for permission to revise the caption of the case to remove Ms. Mathews' name or otherwise indicate that she was deceased; or
g) Her failure to indicate Ms. Mathews' death when signing pleadings.

Ms. Lake failed to provide any answers to the trial court on all of these issues, and continued representation of a dead person without informing the trial court and the City was the basis of the CR 11 sanctions, and that Order should be affirmed by this Court.

G. Response to Appellants' Challenges to the Trial Court's April 15, 2016 Ch. 64.40 Order for Attorney Fees and Costs[64] (April 15, 2016 Also *Fourth* Notice of Appeal)

In addition to entering the *Order for CR 11 Fees* in the amount of $45,000, on April 15, 2016, the trial court also entered an *Order Granting City of Puyallup an Award of Reasonable Attorneys' Fees and Costs Pursuant to Ch. 64.40 RCW.* CP 7480-7501. The City brought two

[63] As set forth in the transcripts of the hearings in January and June of this year, and as quoted above, Ms. Lake could not – or would not – tell the trial court when she first learned that Ms. Mathews died. Ms. Lake's response to the Court's inquiry was to not answer the question and then quote Hillary Clinton "*what difference does it make*"?

[64] A copy of this order (CP 7480-7501) is attached as Appendix I.

alternative motions for fees—(1) a CR 60 motion to "amend" the Court's July 20, 2015 to vacate as applying only to Doris Mathews, thereby reinstating the June 21, 2013, summary judgment and December 13, 2013 final judgment against Ted Spice and Plexus; and in the alternative, (2) a renewed motion for attorney's fees apparently relying upon CR 54, based on the City's second motion for summary judgment granted July 20, 2015.

The trial court granted the renewed motion pursuant to CR 54, and imposed fees and costs against Spice and Plexus in the amount of $132,790.65, which was the same amount awarded by the trial court in on December 13, 2013. CP 2590. In their appeal from this Order, Appellants argue that there was "not an attorney provision allowing for a Motion of this type,"[65] that the "CR 59 Motion was Untimely and Barred,"[66] and that the requested relief was barred by judicial estoppel.[67]

It should be noted at oral argument on the fee award, the Court explained to the parties that it had engaged in "a lot of work" and much thought had gone into the Order.

> Counsel, there's been a lot of work done on the issues in relation to the attorneys' fees, and a tremendous number of hours and intellectual effort put into this. I can say that without even risking modesty because it was—certainly, I was involved, but a really, really smart third year law student was deeply involved in this as well, and right or wrong, a lot of thought went into this. So I just—obviously, somebody wins, somebody loses, but I think people at least deserve to know that the judge just didn't take a superficial look and

[65] *Brief*, at 92.
[66] *Brief*, at 94-96.
[67] *Brief*, at 96-100.

move on.

RP 16:15-25, April 15, 2016. The trial court's Order should be affirmed because it was based on sound legal reasoning and Appellants fail to provide this Court with any basis for overturning it.

1. Fees are Proper Because Plaintiffs' Complaint was Brought Pursuant to RCW 64.40.020

"RCW 64.40.020(2) provides that a prevailing party in an action brought pursuant to that chapter may be entitled to reasonable costs and attorneys' fees." *Cox v. City of Lynnwood*, 72 Wn. App. 1, 12, 863 P.2d 578 (1993) (emphasis added). Ch. 64.40 allows for attorney fees to be granted in an action brought pursuant to that chapter. Appellants undeniably brought their Complaint for Damages pursuant to Ch. 64.40 RCW (CP 1-28), and subjected themselves to attorneys' fees. The trial court dismissed the Complaint on Summary Judgment and Ch. 64.40 provides the statutory legal basis for awarding fees—no distinction is made as to the grounds upon which the summary judgment dismissal is made. The key is whether there is a statutory basis for fees, which Ch. 64.40 provides.

2. Appellants Completely Ignore the Trial Court's Rulings and do not in any way Distinguish them. The Renewed Motion for Fees was Granted by the Trial Court Pursuant to CR 54, not CR 59

Appellants do not even address or acknowledge CR 54 as the grounds for the trial court's granting of the City Renewed Motion for Attorney Fees. They simply regurgitate the arguments they made to the trial court about the application of CR 59. The failure to address CR 54 is fatal

to their argument since failure to present any argument in support of an assignment of error renders it waived. RAP 10.3(a)(6); *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 188 Wn. App. 949, 959 n.9, 355 P.3d 1199 (2015), *rev. den.* 184 Wn.2d 1039 (2016). How can this Court grant Appellants' appeal on this issue when Appellants fail to address the specific findings of fact and conclusions of law they contest? *See, also, Lint, supra,* 135 Wn.2d at 533 (uncontested findings of fact are verities on appeal).

Since the City's motion for renewed fees did not seek to alter or amend the Court's July 20, 2015 motion to vacate but, rather, sought what is due from the July 20, 2015 motion for summary judgment, this should be affirmed on appeal. Appellants have failed to provide any meaningful opposition.

The trial court held that the City's renewed motion for fees was properly governed by CR 54(d)(2), and granted the motion pursuant to this provision. CR 54(d)(2) provides as follows: "(2) Attorneys' Fees and Expenses. Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. ***Unless otherwise provided by statute or order of the court***, the motion must be filed no later than 10 days after entry of judgment." [emphasis added.] The trial court went on to hold that "while CR 54 bears similar timeliness requirements to CR 59, "appellate courts have shown more deference to trial courts in allowing untimely CR 54 motions to be filed." Citing *O'Neill v. City of Shoreline*,

183 Wn. App. 15, 23, 332 P.3d 1099 (2014) (court held that the respondent's right to recover fees under their untimely CR 54(d)(2) motion was not waived because the opposing party had failed to demonstrate any prejudice). Here, the Appellants could not and cannot show any prejudice.

> [T]he City of Puyallup's motion for attorney fees is based on the same grounds and evidence that were argued in its 2013 motion for attorney's fees. Since the previous motion for attorney's fees was already litigated by the parties twice, once under RCW 64.40.020 and once under CR 11, it can be said that Mr. Spice had time to prepare, provide countervailing oral argument, and submit case authority in accordance with *O'Neill*.
>
> The court finds there is no showing of prejudice by Mr. Spice. This is in effect the third motion for attorney fees by the City of Puyallup. The City's motion for fees based on the July 20, 2015 summary judgment and RCW 64.40.020 should be granted.

CP 7501. The Court properly held that CR 54 governed the motion and granted it on these grounds.

3. The Trial Court did Not Abuse its Discretion in Awarding the City Fees of $132,790.65 Against Spice and Plexus

"Whether the amount of fees awarded was reasonable is reviewed under an abuse of discretion standard. A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion." *Eleanor v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). Here, the City only asked the trial court to essentially make it whole for the attorneys' fees it was awarded in 2013. The trial court considered the Lodestar factors

(CP 7481, 7491-92), and segregated out the fees for the non-ch. 64.40 claims (CP 7485-7486). The City did not request additional fees associated with continuing to litigate the case due to the Appellants' deception in not disclosing the death of Doris Mathews. The attorney fee award was properly calculated, was not an abuse of discretion and should be affirmed.

4. The Requested Relief was Not Barred by Judicial Estoppel

Just as they did before the Trial Court, Appellants again argue judicial estoppel should have prevented the Trial Court from granting the City's motion. Again, Appellants ignore the basis upon which the motion was granted—it was granted under CR 54, not CR 59 or CR 60. Further, there are no State or local court rules that prohibit or limit filing a renewed, non-dispositive motion (such as the ch. 64.40 motion here) – particularly where new facts are present and there is no prejudice to the opposing party. More importantly, judicial estoppel is a disfavored remedy.[68] *Vehicle Market Research, Inc. v. Mitchell Intern., Inc.*, 767 F.3d 987, 997 (10th Cir. 2014). "The heart of the doctrine of judicial estoppel is the prevention of inconsistent positions as to facts. It does not require counsel to be consistent on points of law." *Anfinson, supra.*, 159 at 62. The City never took an

[68] "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in court proceedings and later seeking an advantage by taking a clearly inconsistent position. Judicial estoppel requires the court to analyze three questions: (1) whether a party's current position is inconsistent with an earlier position; (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court; and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 61-62, 244 P.3d 32 (2010).

inconsistent position as to any facts in this case.

If anything, Appellants should have been judicially estopped from arguing against the renewed Motion for Fees. Appellants and their attorneys are the ones who hid facts from the trial court (the death of Ms. Mathews), and because of that the City has had to go to great expense to correct Appellants' wrongs for which their counsel still refuses to claim responsibility. Further, Appellants emphatically argued in their responsive briefing on the issue that "***This Order of Remand*** [from this Court] ***is expressly limited at most to the 2013 money judgment against Ms. Mathews***." CP 3168, ll. 15-16 (emphasis added).

Appellants' position is unbelievable—they believe that it is "equitable" that the City lose its ch. 64.40 Judgment of nearly $133,000 because of the deceit of Spice and attorney Lake in not disclosing that Ms. Mathews had died years before the Judgment was entered. The City and its taxpayers were cheated out of collecting this judgment and Appellants attempting to hide without merit behind the empty doctrine of judicial estoppel is appalling.

"It is well settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of a prior motion, were not known to the party seeking renewal, and, consequently, not made known to the court." *Brooklyn Welding Corp. v. Chin*, 236 A.D.2d 392 (N.Y. 1997). Here, the key fact that was not known to anyone at the time the first judgment was entered in 2013 was that Doris Mathews, against whom the judgment had been entered, was dead. There is no basis for the

application of judicial estoppel, and the trial court's Order is not inconsistent with any previous orders. The City was not precluded from renewing the ch. 64.40 motion because it was previously decided without the trial knowing one key fact—that Doris Mathews, the majority property owner, was dead.

Finally, the trial court emphasized that there "was no showing of prejudice by Mr. Spice. This is in effect the third motion for attorneys' fees by the City of Puyallup." CP 7501. There is absolutely no prejudice to Appellants to, in essence, put back in place an order and judgment awarding to the City the exact same amount of fees and costs as it did in 2013, against two of three of the same parties as it did, and on the exact same basis (RCW 64.40.030) as it did, and based on the exact same record (briefing, declarations and opposition, etc.) as it did in 2013. Spice and Plexus will be put back in the exact same situation (and so will the City) as they were just prior to the Court's entry of the July 20, 2015 Order vacating the prior orders and judgments.

Because the relief sought by the City created no prejudice to Appellants, and was not abuse of the trial court's discretion, and because RCW ch. 64.40 fee Judgment was properly entered against Ted Spice and Plexus, jointly and severally, in the same amount as was awarded in December, 2013 ($132,790.65), the Order should be affirmed by this Court.

H. Response to Appellants' Challenges to the Trial Court's April 15, 2016 Supplemental Order and two Final Judgments[69] (April

[69] A copy of the order (CP 7528-7529) is attached as Appendix J, and the two judgments (CP 7530-7533) as Appendix K.

15, 2016 *Fifth* Notice of Appeal)

The Appellants do not make any argument in support of their Fifth Notice of Appeal; they only challenge the orders that precipitated the final judgments being entered against them. Accordingly the Court should affirm the Supplemental Order and the two Judgments entered on April 15, 2016.

I. Request For Attorneys' Fees On Appeal

Pursuant to RAP 18.1(a), the City requests an award of reasonable attorneys' fees and costs under RCW 4.84.370 for prevailing in every administrative and judicial forum on Appellants' LUPA claim, and RCW 64.40.020(2) for prevailing on Appellants' RCW ch. 64.40 damage claim. In accordance with CR 11 and RAP 18.7, the City also requests fees on appeal for defending attorney Lake's challenges to the Trial Court's CR 11 sanction award. A prevailing party may recover attorneys' fees only if provide by statute, agreement or equitable principles. *Tacoma Northpark, LLC v. NW, LLC,* 123 Wn. App. 73, 84, 96 P.3d 454 (2004); RAP 18.1(a). Here, the City is entitled to reasonable fees and costs on appeal under RCW 4.84.370, RCW 64.40.020(2), and CR 11 and supportive case law.

RCW 4.84.370 provides that reasonable attorneys' fees and costs shall be awarded "to the party who prevails or substantially prevails at the local government level, the superior court level, and before the Court of Appeals or the Supreme Court." *Julian v. City of Vancouver*, 161 Wn. App. 614, 631-32, 255 P.3d 763 (2011) (quoting *Baker v. Tri-Mountain Res., Inc.*, 94 Wn. App. 849, 852, 973 P.2d 1078 (1999)). Here, the Complaint makes clear that Appellants are challenging a land use decision (City failure

to issue water service letter without annexation condition). CP 1-28. The record is clear that the City has prevailed before the Hearing Examiner (CP 13-16), the September 12, 2008 Order denying Appellants' relief and remanding to the Hearing Examiner (CP 666-668), and Superior Court dismissal of all claims – twice (CP 1141-1144 and 3409-3421). Assuming this Court affirms the trial court's September 12, 2008, June 21, 2013 October 10, 2013, December 13, 2013, July 20, 2015, and April 15, 2016 Orders, the Court should award the City its attorneys' fees and costs on appeal under RCW 4.84.370 and RAP 18.1(a).

RCW 64.40.020(2) provides that reasonable attorneys' fees and costs may be awarded to the prevailing party under RCW ch. 64.40. *See Cox v. City of Lynnwood, supra*, 72 Wn. App. at 11-12. Such fees are allowed on appeal, too. *Id.*; *see also, Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 127-128, 829 P.2d 746 (1992). The City has had Appellants' ch. 64.40 damage claim dismissed not once, but twice. Judge Nevin has concluded there is no merit to this claim, for the many reasons discussed in the City's first summary judgment motion (CP 1652-1696), the City's response to Appellants' Motion for Reconsideration (CP 2222-2272), and in its ruling on the City's Second (renewed) Motion for Summary Judgment (CP 3409-3421). This Court should affirm these orders, and award the City its reasonable attorneys' fees and costs on appeal under RCW 64.40.020(2) and RAP 18.1(a).

Finally, attorneys' fees should be awarded to the City on appeal for having to defend the assessment of CR 11 fees imposed on attorney Lake.

"Under RAP 18.7, CR 11 is made applicable to appeals." *In Re Guardianship of Lasky*, 54 Wn. App. 841, 856, 776 P.2d 695 (1989); *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 580-81, 754 P.2d 1243 (1988). In *Lasky*, the Court of Appeals held that attorney fees were assessed for the appeal pursuant to CR 11 because the appeal was based on the same facts that the trial court found to have resulted in CR 11 violations. Similarly, here the City is entitled to its fees on appeal having to defend the award of CR 11 fees.

IV. CONCLUSION

Appellants' Brief claims that this appeal is about the LUPA. It is not. It is about their pursuit of the 64.40 damage claim which they have continued to prosecute for the last nine years and seven years after Doris Mathews died without them or their attorney ever informing the Trial Court.

In conclusion, the City respectfully requests that this Court dismiss this appeal, affirm all orders and judgments of the trial court, and award the City of Puyallup its attorneys' fees on appeal. This litigation must end.

Respectfully submitted this 23rd day of November, 2016.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

By: _____
Michael C. Walter, WSBA #15044
Kimberly J. Waldbaum, WSBA #31529
Attorneys for Respondent City of Puyallup

DECLARATION OF SERVICE

I declare that on November 23, 2016, a true and correct copy of the foregoing document was sent to the following parties of record **via U.S. First Class mail and courtesy email**:

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Email: phanis@hiplawfirm.com

DATED this 23rd day of November, 2016, at Seattle, Washington.

LaHoma Walker, Legal Assistant
Keating, Buckling & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX A

APPENDIX A

ORDINANCE NO. 2790

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PUYALLUP, WASHINGTON, amending Chapter 14.22 of the Puyallup Municipal Code relating to utility extensions.

WHEREAS, the City Council recognizes that on occasion, a need arises to address rules and regulations promulgated for the health, welfare, and benefit of citizens; and

WHEREAS, revisions to the Puyallup Municipal Code are proposed when existing code sections are no longer applicable, are in conflict with other provisions, or no longer serve the general good and welfare of the citizens; and

NOW THEREFORE, the City Council of the City of Puyallup, Washington, hereby ordains as follows:

Section 1. Chapter 14.22 of the Puyallup Municipal Code entitled "Sewer and Water Extensions Outside City Limits" is hereby amended as follows:

Chapter 14.22
SEWER AND WATER EXTENSIONS OUTSIDE CITY LIMITS

Sections:

14.22.005 Findings of fact.

(1) For many years, the City of Puyallup has required annexation or a binding contractual commitment to annex as a condition for properties located outside the City limits to receive water and/or sewer service from the City's utilities; and

(2) Washington statutes and case law provide that Cities are not legally required to provide water or sewer or other utility services to properties located outside the City limits, but that Cities have the discretion to provide such utilities as a legislative decision, on terms and conditions set forth in a contract; and

(3) The City of Puyallup is not the sole or exclusive provider for water or sewer or other utility services in any area outside the City limits, and property owners have other options for water and sewer service to such properties outside the City limits; and

(4) The City of Puyallup established and maintained requirements and practices for providing sewer and water extensions and service to properties outside the City limits before adoption of the Washington Growth Management Act and such requirements and practices were and continue to be consistent with the goals, polices and requirements of the GMA; and

(5) One of the underlying policies of the Washington Growth Management Act, codified as Chapter 36.70A RCW, is to ensure that urban development occur in an orderly fashion in established growth areas; and

(6) The City of Puyallup adheres to the policy objectives of the Growth Management Act, including the proposition that urban density development occurring in its urban growth area should at the appropriate time be annexed into the City so as to be provided all the municipal services afforded by the City; and

(7) The City of Puyallup is willing to annex properties located within its Urban Growth Area; and

(8) The City has long relied upon Pre-Annexation Utility Extension Agreements as the contracts property owners must execute in order to receive City utility services outside the City limits, and such Agreements all require the signing parties and their successors to support annexation efforts that might come to pass, and to comply with the City's comprehensive plan, zoning and development regulations; and

(9) The Puyallup City Council finds that the City's ability to plan for utility service, other public services and urban growth may be jeopardized unless the City's code reads as set forth below; and

(10) The Puyallup City Council finds that the provisions of this chapter are necessary to protect and preserve the City's police power authority to control and regulate land that will, at some time, come in to the City, and to ensure that such land will be developed consistent with the City's comprehensive plan, zoning and development regulations.

14.22.007 City is not the sole or exclusive provider of utility services outside the City limits.

The City Council hereby reasserts and reaffirms its position that the City of Puyallup is not the sole or exclusive provider of sewer or water service in any area outside of the City's corporate limits. The City shall not be considered or construed as being the sole or exclusive utility purveyor for any properties outside of the City's corporate limits or within the City's urban growth area, and no action, omission, statement or decision of the City, other than a valid legislatively approved Utility Extension Agreement fully complied with by the property owner, shall in any way be considered or construed as a contract, express or implied, for the extension or supply of water or sewer utilities to the urban growth area or any area outside of the City's corporate limits.

14.22.010 City council approval required.

It shall be the policy of the city of Puyallup that all applicants for the extension/connection of water or sewer service outside the corporate limits of the city of Puyallup shall be subject to review and require approval by the City Council prior to the issuance of a permit for the

extension/connection of water or sewer service, except as provided in PMC 14.22.015. Applicants must demonstrate that they have initiated or are part of an ongoing annexation process which would bring the property that is subject to a utility extension/connection application into the Puyallup city limits. In its review, the city council may consider the following: impact on the water or sewer system usage; annexation considerations; compliance with the city of Puyallup's comprehensive plan and the city of Puyallup development standards; and any other considerations deemed appropriate by the city council. The council shall consider the recommendations of the Development Services Administrator and the City Attorney. The decision of the city council shall be a discretionary, legislative act. If approval is granted by the City Council, it shall be in the form of a utility extension agreement approved by the City Attorney.

14.22.011 Pre-application conference and application fee.

Prior to the acceptance of an application by the city, applicants shall participate in a pre-application conference for the purpose of establishing the application fee. The purpose of the application fee is to ensure the recovery of city costs and expenses associated with the review of the application and drafting or preparing any utility extension agreement, including but not limited to actual costs of city staff time and resources as well as any outside consultation expenses which the city reasonably determines are necessary to adequately review, prepare and analyze the application and any proposed extension agreement. The application fee shall be a minimum of $2,500, with additional charges due depending upon estimated reasonable city costs and expenditures in review of the application. Disputes in the fee amount charged by the city shall be resolved by appeal to the hearing examiner. All applicants shall deposit the application fee with the city before the application will be processed. The application fee shall be applied towards actual expenses and costs of the city. Any unencumbered application fees in excess of $2,500 shall be refunded to the applicant upon written request of the applicant within 60 days after granting or denial of the permit. In addition to application fees, all applicants shall be responsible for the full cost of any infrastructure or facility improvements required to provide the requested utility service; provided, reimbursement or latecomers agreements may be pursued by the applicant.

14.22.015 Emergency exception.

Properties within the City's urban growth area currently served by wells or septic systems which fail may be provided city water or sewer service respectively under this emergency exception if such service can reasonably be made available. Applications under this exception must be filed with the Development Services Administrator, in a written form approved by the Administrator. The Administrator shall have discretion to determine whether an emergency exists, qualifying the applicant for utility service(s) under this section. The Administrator is hereby authorized to conduct all lawful research and investigations needed to reach a determination and to require additional studies or information from an applicant, the costs of which shall be the applicant's responsibility. The Administrator shall seek to issue a written determination as soon as possible after receiving a complete written application, understanding that additional studies or investigation may delay any determination. The Administrator's final

determination shall be issued in writing, and may be appealed as an administrative decision to the Hearing Examiner within 10 days of issuance.

14.22.020 Permit issuance for outside city connection.

Permits or approvals for connections to City sewer or water utility service may be issued only upon the written application of the property owner and subject to the following terms and conditions:

(1) The applicant must be within the city of Puyallup urban growth area and shall first obtain City Council approval as required by PMC 14.22.010.

(2) The applicant for any such permit shall attach to the application a construction permit duly issued to the applicant or their contractor by the appropriate county and/or political subdivision for the construction of a side sewer and/or water service.

(3) The applicant or their licensed contractor shall agree to pay a monthly sewer and/or water service in strict compliance with the specifications of the city governing the construction and maintenance of side sewers and/or water services.

(4) The applicant shall agree to pay monthly sewer and/or water service charges for sewer and/or water service in an amount computed at twice the charge for residents of the city; further, any connection fees and/or system development charges, including without limitation those detailed in PMC 14.26.070, shall also be at twice the charge to residents of the city. Upon annexaton, monthly rates shall be reduced to those applicable to customers located within the city limits.

(5) The applicant shall agree to annex to the city of Puyallup at such time the city desires to annex the property for which water or sewer service has been extended.

14.22.021 Existing Utility Extension Agreements. City water and sewer service may be extended and permits issued to serve properties within the urban growth area at the time such properties annex to the City. Utility Extension Agreements executed before the effective date of this ordinance will be honored, and City water and sewer service, and any permits authorized under the terms of a valid Utility Extension Agreement, will be made available to properties covered by such Agreements, so long as parties are in full compliance with each and every term of their respective Utility Extension Agreements. The City will not continue to provide water or sewer service to any properties covered by a Utility Extension Agreement where the owner is not in compliance with each and every term of the respective Agreements.

Section 2. ***Publication***. A summary of this ordinance shall be published as required by law.

Section 3. ***Severability***.

(1) If a section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

determination shall be issued in writing, and may be appealed as an administrative decision to the Hearing Examiner within 10 days of issuance.

14.22.020 Permit issuance for outside city connection.

Permits or approvals for connections to City sewer or water utility service may be issued only upon the written application of the property owner and subject to the following terms and conditions:

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Section 2. ***Publication***. A summary of this ordinance shall be published as required by law.

Section 3. *Severability*.

(1) If a section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

(2) If the provisions of this ordinance are found to be inconsistent with other provisions of the Puyallup Municipal Code, this ordinance is deemed to control.

Section 4. ***Effective date***. This ordinance shall be in full force and effect five days after publication as required by law.

DATED this 21ST day of JUNE 2004.

Kathy R. Turner, Mayor

ATTEST:

Barbara J. Price, City Clerk

APPROVED AS TO FORM:

Gary N. McLean, City Attorney

Published: JUNE 24, 2004
Effective Date: JUNE 229, 2004

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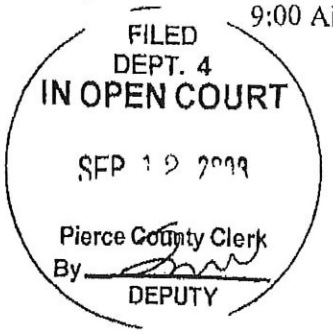
Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX B

APPENDIX B

Judge Bryan Chushcoff
Hearing Date: March 28, 2008
9:00 AM



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

TED SPICE and PLEXUS DEVELOPMENT, LLC, and DORIS E. MATTHEWS, Petitioners, vs. PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation, Respondents.	**No. 07-2-11635-0** **ORDER AFFIRMING DECISION OF PIERCE COUNTY HEARING EXAMINER, AND REMANDING CASE FOR FURTHER PROCEEDINGS**

This matter came before the Court on January 25, 2008, for hearing on the following:

1. Respondent City of Puyallup's Amended Motion to Dismiss Petition for Failure to Exhaust Administrative Remedies, which was filed with the court on November 29, 2007;

Puyallup City Attorney
330 Third Street, S.W.
Puyallup, WA 98371
253-770-3324

APPENDIX 1

2. Petitioners' Motion for Summary Judgment, which was dated November 30, 2007; and
3. The merits of Petitioners' Petition for Judicial Review (Land Use Petition Act); Declaratory Judgment Action & Complaint for Damages Pursuant to Chapter 64.40 RCW, which dated August 29, 2007.

Petitioners were represented at the hearing by their attorney, Carolyn A. Lake of Goodstein Law Group, PLLC. Respondent Pierce County was represented at the hearing by David David B. St.Pierre, Deputy Prosecuting Attorney, Pierce County Prosecuting Attorney - Civil Division. Respondent City of Puyallup was represented at the hearing by Kevin J. Yamamoto, Assistant City Attorney; Also present on behalf of the City of Puyallup was Michael C. Walter of Keating, Bucklin & McCormack, Inc. P.S.

The court considered the administrative record, the pleadings of the parties and the argument of counsel. Based on the record, pleadings and argument, the court rules and orders as follows:

1. The court affirms the August 7, 2007 decision of the Pierce County Hearing Examiner, to wit: The Pierce County Hearing Examiner does not have the power to compel the City of Puyallup to provide water service to Petitioner's property. However, the Hearing Examiner does have the power to determine what reasonable pre-conditions the City of Puyallup may place upon the furnishing of water (Puyallup concedes that Petitioners are within its water service area) including whether Puyallup may require annexation of Petitioner's real property into the City as a pre-condition of providing commercial water service to

Puyallup City Attorney
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Petitioners and/or to processing an appropriate application for water service or changes in water service (whether commercial or residential) in accord with pertinent Puyallup Municipal Code.

2. This matter is remanded to the Pierce County Hearing Examiner for proceedings consistent with this ruling.

3. If Petitioners do continue to pursue a change in their existing water service from the City of Puyallup, they have to comply with the application process set forth in pertinent Puyallup Municipal Code, except insofar as the Code is inconsistent with this order.

Dated: Sept. 12, 2008.

Bryan Chushcoff
Judge Bryan E. Chushcoff

FILED
DEPT. 4
IN OPEN COURT
SEP 12 2008
Pierce County Clerk
By _____ DEPUTY

Presented by:

Kevin J. Yamamoto 26787
Senior Assistant City Attorney
Attorney for Respondent City

Approved for entry:

K Yamamoto
For
David B. St.Pierre 27888
Deputy Prosecuting Attorney
Attorney for Respondent County

4. This Department retains jurisdiction over this matter in the event of ~~additional~~ issues that bring this matter back before the superior court.

5. With the entry of this order as to the LUPA matter the Declaratory Judgment action is moot.

6. Petitioner's cause of action for damages and attorney fees pursuant to RCW 64.40 shall be bifurcated from the LUPA appeal and set for trial.

Puyallup City Attorney
330 Third Street, S.W.
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Approved for entry:

Michael C. Walter 15044
Keating, Bucklin & McCormack, Inc., P.S.
Attorney for Respondent City

Approved as to form:

Carolyn A. Lake 13980
Goodstein Law Group, PLLC
Attorney for Petitioners

Puyallup City Attorney
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Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX C

APPENDIX C

07-2-11635-0 40746724 ORGSJ 06-21-13

JACK NEVIN

HONORABLE [redacted]
Hearing Date: **Friday, May 31, 2013 @9:00 a.m.**

FILED
DEPT. 6
IN OPEN COURT
JUN 21 2013
Pierce County, Clerk
By DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE and PLEXUS DEVELOPMENT, LLC,

Plaintiffs,

v.

PIERCE COUNTY, a political subdivision, and the CITY OF PUYALLUP, a municipal corporation,

Defendants.

No. 07-2-11635-0

[redacted]
ORDER GRANTING SUMMARY JUDGMENT, DISMISSING CASE WITH PREJUDICE AND AWARDING ATTORNEYS' FEES

{Clerk's Action Required}

THIS MATTER CAME ON FOR HEARING upon Respondent City of Puyallup's Motion for Summary Judgment dated March 29, 2013.

Respondent City of Puyallup, the moving party, appeared by and through its associated counsel of record, Michael C. Walter of Keating, Bucklin & McCormack, Inc., P.S., and Kevin J. Yamamoto, City of Puyallup City Attorney. Petitioners Ted Spice, Plexus Development, LLC, and Doris E. Mathews appeared by and through their associated counsel Stephen M. Hansen of the Law Office of Stephen M. Hansen, P.S., and Carolyn A. Lake of Goodstein Law Group, PLLC. Respondent Pierce County was previously

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ATTORNEYS AT LAW
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SEATTLE, WASHINGTON 98104-3175
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FAX: (206) 223-9423

APPENDIX 2

dismissed with prejudice from this case with no fees or costs as to any party, and did not appear at the motion hearing.

THE COURT CONSIDERED the following pleadings, memoranda, briefs and declarations by the parties:

1) *Petitioners' Motion to Continue Summary Judgment Hearing Date and Subjoined Declaration of Counsel*, dated April 2, 2013 (and attachments and exhibits thereto);

2) *Respondent City of Puyallup's Motion for Summary Judgment*, dated March 29, 2013;

3) *Declaration of Michael C. Walter in Support of Respondent City of Puyallup's Opposition to Petitioners' Note for Trial Setting*, dated March 20, 2013 (and attachments and exhibits thereto);

4) *Declaration of Kevin J. Yamamoto in Support of Respondent City of Puyallup's Opposition to Petitioners' Note for Trial Setting*, dated March 18, 2013 (and attachments and exhibits thereto);

5) *Petitioners' Reply [sic] Opposing Summary Judgment*, dated May 20, 2013;

6) *Declaration of Counsel (Carolyn Lake)*, dated May 20, 2013 (and attachments and exhibits thereto);

7) *Declaration of Ethan Offenbecher*, dated May 20, 2013 (and attachments and exhibits thereto);

8) *Declaration of Petitioner Ted Spice*, dated May 20, 2013;

9) *Reply of City of Puyallup to Petitioners' Reply [sic] Opposing City Motion for Summary Judgment*, dated May 28, 2013;

10) *Defendant City of Puyallup's Objection to Plaintiffs' Submission of 1) Inadmissible evidence and 2) Unsupported Argument, and Request to Strike* dated May 28, 2013;

11) *Declaration of Kevin Yamamoto in Support of Reply of City of Puyallup to Petitioners' Reply Opposing City Motion for Summary Judgment*, dated May 27, 2013 (and attachments and exhibits thereto); and

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12) *Supplemental Declaration of Michael C. Walter in Reply to Petitioners' Opposition and in Additional Support of the City's Motion for Summary Judgment*, dated May 28, 2013 (and attachments and exhibits thereto).

THE COURT DECIDED the City of Puyallup's Motion for Summary Judgment, pursuant to CR 56 and PCLR 56, after hearing argument by counsel for all parties on May 31, 2013. The court only considered those pleadings properly before the court pursuant to local and state court rules. The court did not consider pleadings which were not timely filed pursuant to local court Rules. gn

BASED ON THE FOREGOING and pursuant to CR 56 and PCLR 7(b)(10), the Court concludes as follows: (1) There has been no compliance with the Court's September 12, 2008 Order and no remand to the Hearing Examiner; (2) Petitioners have ~~now stipulated~~ signed a stipulation acknowledging ~~have~~ signed on 23 may 2013 and properly before the court, that the LUPA matter "has been fully adjudicated"; (3) the Pierce County Hearing Examiner's August 7, 2007 Decision is final and binding; (4) Petitioners have not complied with the City of Puyallup's water service requirements, and never submitted an application for water service or change of water service to the City; and (5) ~~in light of conclusions (1)-(4).~~ Petitioners cannot meet various predicate requirements for a cause of action under RCW ch. 64.40 and, therefore, Petitioners' RCW ch. 64.40 damage claim is not ripe and Petitioners lack standing to pursue that claim; The court further finds that irrespective of defendant's argument of plaintiffs' judicial estoppel it is appropriate to dismiss the LUPA action. The court accepts and agrees with the authorities submitted by the City in their Memorandum dated 29 March 2013, specifically pages 18-31 and all other filings properly before this court, in this matter. gn

ORDERED, ADJUDGED AND DECREED the Pierce County Hearing Examiner's August 7, 2007 decision is final and binding, and any claims arising out of that decision are now barred from judicial or other review; and, it is hereby also

ORDERED, ADJUDGED AND DECREED that Petitioners' LUPA claim is final, binding and "fully adjudicated," and any further trial court review of or claims arising out

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of that LUPA Petition are barred, and that claim is hereby **DISMISSED WITH PREJUDICE**; and, it is hereby also

FILED
DEPT. 6
IN OPEN COURT
JUN 21 2013
Pierce County, Clerk
By _____
DEPUTY

~~ORDERED, ADJUDGED AND DECREED that Petitioners' declaratory judgment claim has been rendered moot, and is hereby DISMISSED WITH PREJUDICE; and, it is hereby also~~

ORDERED, ADJUDGED AND DECREED that the Respondent City of Puyallup's Motion for Summary Judgment is hereby **GRANTED**; and, it is hereby also

ORDERED, ADJUDGED AND DECREED that all claims and causes of action in this matter are hereby **DISMISSED WITH PREJUDICE**; and, it is hereby also

ORDERED, ADJUDGED AND DECREED that the Respondent City of Puyallup is the prevailing party in this action, and that the City is entitled to an award of reasonable attorneys' fees and costs pursuant to RCW ch. 64.40.020(2). The City shall submit a memorandum addressing the calculation of fees and costs, a cost bill or declarations establishing the amount of fees and costs requested, and a proposed order containing findings to support the requested fee/cost award.

DATED this 21 day of June, 2013.

HONORABLE JACK F. NEVIN,
JUDGE

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Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

Michael C. Walter, WSBA #15044
Attorneys for Respondent City of Puyallup

PUYALLUP CITY ATTORNEY

Kevin J. Yamamoto, WSBA #26787
Puyallup City Attorney

~~**Notice of Presentation Acknowledged and Waived;**~~
~~**Approved for Entry:**~~ Copy received

LAW OFFICES OF STEPHEN M. HANSEN, P.S.

Stephen M. Hansen, WSBA #15642
Attorneys for Petitioners

GOODSTEIN LAW GROUP

Carolyn A. Lake, WSBA #13980
Attorneys for Petitioners

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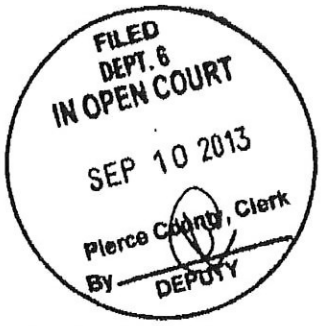
Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX D

APPENDIX D



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

TED SPICE, Plaintiff(s) , vs. PIERCE COUNTY, Defendant(s) .	Cause No: 07-2-11635-0 Order on Motion for Re-Consideration

This matter having come before the court and the court having reviewed the entirety of the records and files in this matter, portions of the transcripts of prior arguments, and last, having heard the arguments of counsel on the motion for reconsideration, makes the following finding:

The court finds that there is no basis for changing It's prior ruling granting summary judgment In favor of the City of Puyallup, and therefore denies Plaintiff 's Motion for Reconsideration.

DATED this 10 day of Sept, 2013.

Jack Nevin
JUDGE JACK NEVIN

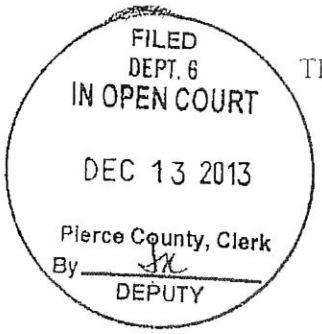
APPENDIX 3

Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX E

APPENDIX E



THE HONORABLE JACK F. NEVIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE AND PLEXUS DEVELOPMENT, LLC, and DORIS E. MATHEWS Petitioners, v. PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 07-2-11635-0 ORDER GRANTING CITY OF PUYALLUP AN AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS [Clerk's action required]

THIS MATTER came before the Court on Respondent/Defendant City of Puyallup's *Motion for Determination of Attorneys' Fees and Costs, and Entry of Final Judgment in Favor of the City of Puyallup*, dated July 1, 2013. Having reviewed the motion and all materials filed in support and opposition, and having considered the Lodestar factors, the Court now GRANTS the motion but reduces the requested fees, awards fees and costs to the City of Puyallup, and authorizes entry of final judgment as set forth below.

I. INTRODUCTION AND EVIDENCE RELIED UPON

Respondent/Defendant City of Puyallup ("City" or "Puyallup"), the moving party, appeared by and through its associated counsel of record, Michael C. Walter of Keating, Bucklin & McCormack, Inc., P.S., and Kevin J. Yamamoto, City of Puyallup City

ORIGINAL

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Attorney. Petitioners/Plaintiffs Ted Spice, Plexus Development, LLC, and Doris E. Mathews (collectively "Plaintiffs") appeared by and through their associated counsel Stephen M. Hansen of the Law Office of Stephen M. Hansen, P.S., and Carolyn A. Lake of Goodstein Law Group, PLLC. Respondent/Defendant Pierce County was previously dismissed from this case and did not respond to the City's motion.

THE COURT CONSIDERED the following pleadings, memoranda, briefs and declarations by the parties:

1) *Order Granting Summary Judgment, Dismissing Case with Prejudice and Awarding Attorneys' Fees,* dated June 21, 2013;

2) *Defendant City of Puyallup's Motion for Determination of Attorneys' Fees and Costs, and Entry of Final Judgment in favor of the City of Puyallup,* dated July 1, 2013;

3) *Declaration of Michael C. Walter Re: City's Request for Attorneys' Fees and Costs,* dated July 1, 2013;

4) *Declaration of Kevin Yamamoto Regarding Attorney Fees and Costs,* dated June 28, 2013;

5) *Petitioners' Response Opposing Respondents' Requested Attorney Fees,* dated August 7, 2013;

6) *Defendant City of Puyallup's Reply in Support of Motion for Determination of Attorneys' Fees and Entry of Final Judgment,* dated August 8, 2013;

7) The Court's September 21, 2013 letter-decision (attached hereto as **Exh. A**); and

8) The pleadings and other documents on file with the Court as of this date.

THE COURT DECIDED this Motion after hearing argument by counsel for the City of Puyallup and the Plaintiffs on August 09, 2013.

II. FINDINGS OF FACT

1. This case was filed in Pierce County Superior Court in August, 2007. The

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lawsuit is a Petition for Judicial Review (Land Use Petition Act), Declaratory Judgment action and Complaint for Damages pursuant to ch. 64.40 RCW. This litigation began on August 29, 2007 and was concluded through a summary judgment order entered on June 21, 2013; therefore the litigation lasted five years and 10 months.

2. The litigation involved review of the record and transcript of the Pierce County Hearing Examiner's August, 2007 Decision, various motions to dismiss by the City as well as a motion for summary judgment by the Plaintiffs, a LUPA hearing, a motion for trial setting, the City's motion for summary judgment which was vigorously opposed, objections to evidence filed by the City, reply briefing, and extensive argument on the City's summary judgment motion on May 31, 2013.

3. Plaintiffs raised many arguments and claims for their ch. 64.40 damage claims, and throughout the litigation relied heavily on the cases of *Michael Stanzel v. City of Puyallup,* Pierce County Cause No. 07-2-11228-1, and *City of Puyallup v. Michael Stanzel,* Pierce County Cause No. 08-2-15809-3, as well the appeals arising out of those cases.

4. The City was represented by two attorneys: Michael C. Walter of the law firm of Keating, Bucklin & McCormack, Inc., P.S., a Seattle law firm emphasizing municipal law and land use and water law matters; and by Kevin Yamamoto, Puyallup City Attorney and associated counsel. Due to the nature of the claims – both equitable and legal (damages) – the breadth of the claims and the litigation in this matter, it was appropriate for the City to have both the City Attorney and outside legal counsel representing and defending the City in this matter. Both attorneys exhibited requisite skill and ~~produced~~

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~~excellent~~ work product throughout the course of this case, ultimately securing summary judgment dismissal of the ch. 64.40 damage claim.

5. On March 29, 2013, the City brought a ~~well-founded~~ Motion for Summary Judgment. The Motion was supported by Declarations of City Attorney Kevin Yamamoto and outside counsel Michael C. Walter. The Plaintiffs vigorously opposed the motion with a "Reply Opposing City's Summary Judgment" and Declarations of Attorney Carolyn Lake, Ted Spice and Ethan Offenbecher submitted on May 20, 2013. The City filed its Reply and also filed an Objection to the Carolyn Lake, Ted Spice and Ethan Offenbecher declarations, and much of the argument in Plaintiffs' response/opposition on May 28, 2013. The Court heard argument on the City's Motion for Summary Judgment on May 31, 2013, granted the City's Motion in full, and Plaintiffs' RCW ch. 64.40 damage claims were dismissed in their entirety. The Court also awarded the City reasonable attorneys' fees and costs pursuant to RCW 64.40.020(2) for their time and expenses defending Plaintiffs' ch. 64.40 damage claims. The Court orally authorized an award of fees and costs at the summary judgment hearing on May 31, 2013.

6. The Plaintiffs and City could not agree on the form or substance of an order granting summary judgment and awarding the attorneys' fees; accordingly, the City filed a Motion for Presentation on June 12, 2013, the Plaintiffs filed a 13-page response with an alternative proposed Order on June 19, 2013, and the City filed a Reply with a modified Order on June 20, 2013. The Court entered an Order on Summary Judgment and Awarding Attorneys' Fees and Costs, in substantially the form proposed by the City on June 21, 2013.

7. The Plaintiffs did not oppose or otherwise respond to the City's request for attorneys' fees and costs at the summary judgment hearing on May 31 or at the order

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presentation hearing on June 21.

8. The City timely brought a motion for a determination of reasonable attorneys' fees and costs for defense of Plaintiffs' ch. 64.40 damage claims as well as entry of final judgment on July 1, 2013. The City requested an award of $145,751.11 for both the attorneys' fees and for costs. Of this amount, the City requested $95,341.10 in reasonable attorneys' fees for attorney Michael Walter's time, $48,320.00 for reasonable attorneys' fees for City Attorney Kevin Yamamoto's attorney time, and $2,090.01 in costs. The City's total attorneys' fee and cost request was comprised of the following hours, billing rates and costs incurred:

Michael C. Walter 2007 Fees (@ $205/hr.)	$7,072.50
Michael C. Walter 2008 Fees (@ $213/hr.)	$8,775.60
Michael C. Walter 2009 Fees (@ $225/hr.)	$720.00
Michael C. Walter 2010 Fees (@ $232/hr.)	$533.60
Michael C. Walter 2011 Fees (@ $237/hr.)	$5,190.30
Michael C. Walter 2012 Fees (@ $245/hr.)	$5,953.50
Michael C. Walter 2013 Fees (@ $253/hr.)	$67,095.60
Attorney time for Kevin Yamamoto (@ $200/hr) (2007 to date)	$48,320.00
COSTS:	$2,090.01
TOTAL REQUESTED ATTORNEYS' FEES AND COSTS:	**$145,751.11**

9. The City did <u>not</u> seek compensation for attorneys' fees or costs incurred in exclusively defending the Plaintiffs' non-ch. 64.40 claims, and the City properly segregated its time entries for just those work items related to or necessarily incurred in defense of the ch. 64.40 damage claims.

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10. The billing rates requested for the City's two lawyers were $205 per hour to $253 per hour for attorney Michael C. Walter; and $200 per hour for attorney Kevin J. Yamamoto. The Court finds that attorney Walter's hourly rate over the years ranging from $205 per hour to $253 per hour, as set forth in his Declaration, was reasonable and fair ~~and customary for similar municipal, land use and water rights lawyers in the Puget Sound area~~. These rates are supported by professional and biographical information as set forth in attorney Walter's Declaration. While attorney Yamamoto has requested an hourly rate of $200, the Court adjusted that hourly rate downward for the years 2007-2012 (the years of this litigation excluding 2013). The Court took the same increments submitted by attorney Walter over the same time span, and applied those increments to attorney Yamamoto's rate in adjusting his $200 per hour requested rate downward beginning in 2012. Accordingly, given this formula, the Court finds and awards attorneys' fee rates for attorney Yamamoto based on these downward adjustments.

11. It was appropriate and reasonable for attorneys Walter and Yamamoto to work cooperatively throughout this litigation, to communicate freely, and to do similar work or review of the others' work product in defending Plaintiffs' ch. 64.40 damage claims. The work by both attorneys was necessary, reasonable and appropriate given the nature of the Plaintiffs' claims, the length of this litigation, the fact that the LUPA and ch. 64.40 claims were inter-related and overlapped, and because of the many unique legal and factual arguments raised by Plaintiffs to support their 64.40 damage claim. The Court found segregating the LUPA claims from the 64.40 claim was a difficult task and at the conclusion of the analysis finds that it is impossible to do so. The Court finds that the legal theories were all inter-related, particularly the LUPA claim and the 64.40 damages claim.

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As a result of this overlap there is no practical way to segregate the time on the LUPA claim from time related to the 64.40 claim.

12. The time (attorney hours) spent by attorneys Walter and Yamamoto overall is fair, reasonable, and was necessary to defend and obtain a successful result on Plaintiffs' ch. 64.40 damage claim. The amount of hours expended by attorneys Walter and Yamamoto reflect a ~~comprehensive~~ thorough factual investigation regarding the substance of the Plaintiffs' ch. 64.40 damage claim and the inter-related LUPA claim, over five years of litigating in two forums (before the Hearing Examiner and in Superior Court), substantial research, detailed ~~dispositive~~ briefing, substantial time and effort reviewing the documentation in the files of this case and the Hearing Examiner's decisions, and the records and various trial court hearings and decisions. Additionally, it was appropriate for attorneys Walter and Yamamoto to include, by necessity, their time and effort reviewing the voluminous documentation, factual background and many Hearing Examiner hearings, trial court rulings, and appellate court rulings in the *Michael Stanzel* litigation, which Plaintiffs contended throughout the litigation was important to or otherwise dispositive of the ch. 64.40 damage claims. The time and effort expended by these attorneys also included multiple hearings, efforts by Plaintiffs to secure a trial date, defense by Plaintiffs of the City's summary judgment motion, opposition to entry of the proposed summary judgment Order, and the present motion.

13. The City's attorneys attempted to, and for the most part did, avoid duplicative and unnecessary work, worked together collaboratively to analyze certain issues when necessary. The Court finds, however, that 16 hours of time by attorney Yamamoto was duplicative of attorney Walter's time; therefore, the Court reduces attorney

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Yamamoto's fees by 16 hours of his time. With the exception of the 16 hours eliminated from attorney Yamamoto's time, the hours expended were reasonable, given the nature of Plaintiffs' claims.

14. Plaintiffs' LUPA and ch. 64.40 damage claims involved a common set of facts; all are based on inter-related legal theories and all arose out of the same land use, utility and annexation condition dispute. Resolution of the LUPA claim, no matter what the ultimate decision, would have an impact on the ch. 64.40 damage claim. *See, City's Motion for Summary Judgment,* pp. 12-16 and 18-22, and City's Summary Judgment *Reply,* pp. 1-5, 8-9, 24-26.

15. The City's attorneys did not include time or costs relating to Plaintiffs' 2006 lawsuit or the subsequent appeals brought by Plaintiffs in that case – except in a few instances where there was an overlap between that 2006 case or Court of Appeals decision and the current (2007) case, or where there were overlaps between the claims in the 2006 and 2007 cases. In those instances, it appears that the attorneys have reduced the time where practicable to reflect the fact that a portion of the time may have been spent regarding the 2006 case. While the attorneys indicate that they may have slightly re-worded some time entries, and consolidated others, they did this for ease of reading and/or to avoid any disclosure of attorney-client privileged, work-protected or otherwise confidential information. To the extent that any billing entries were changed, the attorneys indicate, and the Court accepts, that they erred on the side of conservatism; that is, if in doubt, they deleted the entry. There is no evidence that either attorney added time that did not appear on original invoices.

16. Attorneys Walter and Yamamoto appropriately included time entries for

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researching, reviewing documents related to and defending Plaintiffs' LUPA claim. The Court finds because of the overlap between the LUPA claim and the ch. 64.40 damage claim, it is impossible to segregate time on the LUPA claim from other time directly and specifically related to the ch. 64.40 damage claim. To the extent that the attorneys were able to ferret out specific time entries related solely to the LUPA claim which did not relate to or have an impact on the ch. 64.40 damage claim, the Court finds that they did exclude those.

17. Plaintiffs objected to the City's attorneys' fee motion, but did not submit any evidence in response to the motion.

18. This case involved, *inter alia*:

- Five and one-half years of litigation;
- Two respondents/defendants;
- Three claims – two of which involved extensive research, briefing, document review and summary, numerous court hearings or motions, much communication among the city's attorneys and with Pierce County's attorney;
- A number of meetings with client representatives and trips to Puyallup City Hall;
- Extensive document review, including documents pertaining to administrative hearings and other actions going back to 2006;
- Review of many thousands of pages of documents, hearing examiner records and transcripts, briefing, judicial decisions and research from the *Michael Stanzel* litigation (two separate lawsuits, two separate appeals, multiple remands to the hearing examiner and the trial court, etc.), which Plaintiffs made the gravamen of their ch. 64.40 damage claim and which the City contended was not relevant;
- Defense of unique or unsupported or un-recognized legal theories or

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claims proffered by Plaintiffs;[1]

- Changing legal theories by Plaintiffs;[2]
- Hundreds of pages of briefing by Plaintiffs since the inception of this lawsuit;
- The City's need to challenge inadmissible evidence or improper argument by Plaintiffs; and
- The need to address repeated compliance issues with civil procedure requirements and local court rules.

19. Based on the foregoing, the Court finds that the attorneys' fees requested by Michael Walter and the law firm of Keating, Bucklin & McCormack, Inc., P.S. in the amount of $95,341.10 are reasonable and should be awarded. Based on the foregoing, I find that the attorneys' fees requested by Kevin Yamamoto, Puyallup City Attorney, in the amount of $48,320.00 should be reduced by 16 hours of time which the Court finds to be duplicative, and a downward rate adjustment for the years 2007-2012 consistent with the rate adjustments by attorney Walter in the same increments. Therefore, the Court finds that an award for attorney Yamamoto's work in the amount of $35,359.54, which includes the reduction of 16 hours of time and a downward rate adjustment for the years 2007-2012 in the same rate increments as attorney Walter, is fair and reasonable. Based on the foregoing, the Court finds that the costs requested by the law firm of Keating, Bucklin & McCormack, Inc., P.S. in the amount of $2,090.01 are reasonable and should be awarded.

III. CONCLUSIONS OF LAW

1. Under RCW 64.40.020, the prevailing party is entitled to an award of

[1] For example, the *Stanzel* case as precedent, collateral estoppel based on the City's prior LUPA motion to dismiss, no need to submit an actual application for water service to trigger ch. 64.40 liability, State Water Law as a basis for recovery under ch. 64.40, etc.

[2] For example, after the city's summary judgment motion, Plaintiffs for the first time contended that they never actually submitted an application for City water service, and that, instead, the City allegedly "obstructed" their efforts to apply.

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reasonable attorneys' fees and costs. *See* RCW 64.40.020(2); *See, also, Callfas v. City of Seattle*, 129 Wn. App. 579, 598, 120 P.3d 110 (2005) (fees to the defendant as prevailing party); *Birnbaum v. Pierce County*, 167 Wn. App. 728, 274 P.3d 1070 (2012); (because defendant Pierce County is the prevailing party, it is entitled to reasonable costs and fees) at p. 739; *Manna Funding, LLC v. Kittitas County*, 285 P.3d 1197 (Div. III, 2013); (fees to the defendant as prevailing party); and *Coy v. City of Duvall*, 298 P.3d 134 (Div. III, 2013).

2. On May 31, 2013, the Court granted the City's Motion for Summary Judgment and dismissed this case. At that time, the Court also awarded the City reasonable attorneys' fees and costs under RCW ch. 64.40.020(2). This oral decision was memorialized in the Court's written order entered on June 21, 2013. The City, therefore, is the prevailing party in this action.

3. Having previously found that the City is entitled to an award of reasonable attorneys' fees, the Court used a Lodestar analysis to determine the reasonableness of their request. *See, Tribble v. Allstate Property & Casualty Ins. Co.*, 134 Wn. App. 163, 139 P.3d 373 (2006) (directing a commission of the Court to determine the amount of fees and expenses to be awarded using a basic Lodestar formula); *Metropolitan Mortgage & Securities Co., Inc. v. Becker*, 64 Wn. App. 626, 825 P.2d 360 (1992) (use Lodestar method to determine reasonable attorneys' fees); and *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."). Under the Lodestar method, the Court multiplies the reasonable hourly rate by the number of hours expended – and this is the "Lodestar" amount. *Metropolitan Mortgage & Securities Co., Inc. v. Becker, supra.*

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4. The Court must determine the reasonableness of the hourly rate requested by the City of Puyallup. A reasonable hourly rate is determined by reference to the forum in which the court sits—the Pierce County Superior Court in this case. *See Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997); *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

5. Here, attorney Michael C. Walter's requested attorney billing rates for the time period 2007 to date, vary between $205 per hour to the current billing rate of $253 per hour. Over the five and one-half years of this litigation, his and his firm's hourly billing rate changed slightly to accommodate increased costs, inflation and the Consumer Price Index. From the beginning of this lawsuit (September, 2007) to December 31, 2007, his hourly billing rate was $205 per hour; from January 1, 2008 to December 31, 2008, it was $213 per hour; from January 1, 2009 to December 31, 2009, it was $225 per hour; from January 1, 2010 to December 31, 2010, it was $232 per hour; from January 1, 2011 to December 31, 2011, it was $237 per hour; from January 1, 2012 to December 31, 2012, it was $245 per hour; and, from January 1, 2013 to date, Mr. Walter's hourly billing rate is $253 per hour. At all times during this litigation, Mr. Walter has been a shareholder (partner) in his law firm, and he is currently a Director in the firm. The Court has reviewed, and is persuaded by, evidence produced by Mr. Walter in his Declaration. Plaintiffs did not submit any evidence contradicting the rates, times or other facts in Mr. Walter's declaration. The Court concludes that his billing rates for the applicable time period (August, 2007 through the current date) are fair, reasonable, consistent with other attorneys with similar experience and expertise handling similar municipal law, land use law, water

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law and related claims and litigation, and appropriately reflect the factors set forth in the case of *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

6. Mr. Yamamoto, as an in-house City Attorney, is entitled to make an attorneys' fee claim request based on a specific hourly rate, rather than a rate based on salary plus related costs. *See, State v. Weston,* 66 Wn. App. 140, 149, 831 P.2d 771 (1992) (concluding that "the use of a comparable hourly billing rate from an attorney in the private sector was a reasonable basis for the estimate of the value of the [government] attorney time spent on the case"). Attorney Kevin Yamamoto's requested billing rates during the applicable time period (August, 2007 through the current date) of $200 per hour. Plaintiffs did not submit any evidence contradicting the rates, times or other facts in Mr. Yamamoto's declaration. The Court has reviewed Mr. Yamamoto's Declaration in which he requested a $200 per hour billing rate for the applicable time period (August, 2007 through June, 2013). The Court has however, adjusted Mr. Yamamoto's hourly rate downward for the years 2007-2012, using the same increments submitted by attorney Walter, and applying those rates reductions to Mr. Yamamoto's requested $200 per hour rate which the Court applied for his work in 2013. Accordingly, the Court finds that these downward adjusted rates for attorney Yamamoto are fair, reasonable, consistent with other attorneys with similar experience and expertise handling similar municipal law, land use law and related claims and litigation, and appropriately reflect the factors set forth in the case of *Kerr v. Screen Extras Guild, Inc., id.*

7. The Court must also determine the reasonable number of hours spent defending Plaintiffs' RCW ch. 64.40 claim. *Tribble v. Allstate Property & Casualty Inc. Co., supra; Metropolitan Mortgage & Securities Co., Inc. v. Becker, supra; Hensley, supra.* The City is not required to provide a minute-by-minute account; rather, the City is only required

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to establish, through its declarations and billing entries, the general subject matter of their attorneys' time expenditures. *See Hensley*, 461 U.S. at 437 n. 12; *Lytle v. Carl*, 382 F.3d 978, 989 (9th Cir. 2004). The Court must also be careful to segregate out time entries that were wasteful or duplicative.

8. Here, the Court is persuaded that the time entries identified above by attorneys Walter and Yamamoto were fair, reasonable, necessary and directly related to defense of Plaintiffs' ch. 64.40 damage claim, other than 16 hours of attorney Yamamoto's time which the Court found duplicative of attorney Walter's time. Based on the record, the Court concludes that attorneys Walter and. Yamamoto exercised sound billing judgment, and with the exception of 16 hours of attorney Yamamoto's time entries which appeared duplicative of attorney Walter's time entries, the time they spent was reasonable and necessary to secure a successful result for their client (the City). The Court also concludes that the time spent by these attorneys that was exclusive to the defense of Plaintiffs' other claims was appropriately segregated out, consistent with the case law. *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958, 966 (2001) ("the court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact pattern, but allege different bases for recovery.") (citing *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987)). *See, also, Schwarz v. Sec'y of Health & Human Services*, 73 F.3d 895, 901 (9th Cir. 1995) ("the court must evaluate whether the successful and unsuccessful claims are 'distinctly different claims for relief that are based on different facts and legal theories' or whether they 'involve a common core of facts or [are] based on related legal theories'").

9. The Court also concludes that the time spent by the City's attorneys preparing the present fee Motion is compensable, fair, reasonable and necessary. *Fisher*

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Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 378, 798 P.2d 799, 807 (1990) ("The general rule is that time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable where the fee shifts to the opponent under fee shifting statutes.") (collecting cases); *In re Wind N' Wave*, 509 F.3d 938, 942 (9th Cir. 2007) ("Along with other circuits, we have granted compensation for litigation over a fee award under fee shifting statutes even when those statutes did not expressly allow for it.").

10. The Court concludes that, with the exception of 16 hours of attorney Yamamoto's time entries which were duplicative of attorney Walter's time entries, the time entries by attorneys Walter and Yamamoto are fair, reasonable and necessarily incurred in defense of Plaintiffs' ch. 64.40 damage claims. The Court concludes that, with the exception of 16 hours of attorney Yamamoto's time entries which were duplicative of attorney Walter's time entries, attorneys Walter and Yamamoto properly segregated their time entries and did not include: (1) time entries that were directed exclusively toward the Plaintiffs' non-64.40 claims; (2) time entries that appeared redundant or potentially redundant; (3) time entries that did not appear necessary to defending Plaintiff's ch. 64.40 damages claims; (4) time entries for one of Mr. Walter's former partners, Mr. Rand Ebberson, who initially did some work on the case; and (5) time or fees by former City Attorneys Gary McLean and Cheryl Carlson.

11. All of the claims in this case involved a common set of facts, and were based on inter-related legal theories. Plaintiffs' LUPA claims and the ch. 64.40 damage claims were inextricably tied together, involved a common nucleus of facts and were directly related; therefore resolution of the LUPA claim no matter what would have had an impact on the ch. 64.40 damage claim. *See, City's Motion for Summary Judgment*, pp. 12-16 and

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18-22, and the City's Summary Judgment *Reply*, pp. 1-5, 8-9, 24-26. Denial of the LUPA claim would necessarily preclude Plaintiffs' ch. 64.40 damage claim. *See, id.*

12. The Court concludes that the total fee award set forth below (in the total amount of $132,790.65) is fair and appropriate for the reasons set forth in the preceding findings of facts and because: the case involved much attorney time and work; the litigation spanned five and one-half years; the matter was aggressively prosecuted by the Plaintiffs over the approximately five and one-half year period; the Plaintiffs left no issue unaddressed in their strategy; that for every issue raised by the Plaintiffs, and every brief filed, and every motion noted, there necessarily must be a response from the City; and due to the thorough preparation and zealous advocacy of the Plaintiffs, this case resulted in numerous hours of responsive preparation by the defense (the City), in which the City ultimately prevailed.

13. In total, the Court concludes that the Defendant City of Puyallup is entitled to a total award of **$132,790.65** in both reasonable attorneys' fees and compensable costs in defending Plaintiffs' ch. 64.40 damage claim. This award is comprised of $95,341.10 in reasonable attorneys' fees for Michael C. Walter, $35,359.54 in reasonable attorneys' fees for Kevin J. Yamamoto, and $2,090.01 in costs.

IV. ORDER RE: ATTORNEYS' FEES AND COSTS

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant City of Puyallup is entitled to a total award of **$132,790.65** in reasonable attorneys' fees and costs against Plaintiffs (1) Ted Spice, (2) Plexus Development, LLC, and (3) Doris E. Mathews, jointly and severally

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V. FINAL JUDGMENT

Final judgment shall be entered in favor of the Defendant City of Puyallup and against Plaintiffs Ted Spice, Plexus Development, LLC and Doris E. Mathews, jointly and severally, in the amount of **$132,790.65.**

DATED this 13 day of ~~November~~ Dec, 2013.

Jack Nevin

HONORABLE JACK F. NEVIN
Judge

Prepared and presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

FILED
DEPT. 6
IN OPEN COURT
DEC 13 2013
Pierce County, Clerk
By DEPUTY

Michael C. Walter, WSBA #15044
Attorneys for Defendant City of Puyallup

PUYALLUP CITY ATTORNEY

Kevin J. Yamamoto, WSBA # 26787
City Attorney and co-counsel for City of Puyallup

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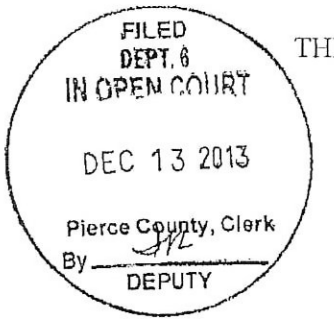
Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX F

APPENDIX F



THE HONORABLE JACK F. NEVIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE AND PLEXUS DEVELOPMENT, LLC, and DORIS E. MATHEWS Petitioners, v. PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 07-2-11635-0 **FINAL JUDGMENT** (Clerk's Action Required)

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the clerk's Execution Docket:

1.	Judgment Creditor:	City of Puyallup, a municipal Corporation
2.	Attorneys for Judgment Creditor:	Kevin Yamamoto, City Attorney City of Puyallup 333 S. Meridian Puyallup, WA 98371 Michael C. Walter Keating, Bucklin & McCormack, Inc., P.S. 800 Fifth Avenue, Suite 4141 Seattle, WA 98104

ORIGINAL

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3.	Judgment Debtors:	Ted Spice Plexus Development, LLC Doris E. Mathews *Judgment entered jointly and severally*
4.	Attorneys for Judgment Debtors:	Carolyn A. Lake Goodstein Law Group, PLLC 501 South "G" Street Tacoma, WA 98405 Stephen M. Hansen Law Offices of Stephen M. Hansen, PS 1703 Dock Street, Suite A Tacoma, WA 98402
5.	Date of Entry of Judgment:	December ~~November~~ 13, 2013
6.	Principal Judgment Amount:	$132,790.65
7.	Judgment shall bear interest at 12% per annum.	
8.	Total Judgment Award:	$132,790.65

DATED this 13 day of ~~November~~ Dec, 2013.

FILED
DEPT. 6
IN OPEN COURT
DEC 13 2013
Pierce County, Clerk
By JK DEPUTY

Jack Nevin
THE HONORABLE JACK F. NEVIN

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Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX G

APPENDIX G

HONORABLE JACK NEVIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE, PLEXUS DEVELOPMENT, LLC, and DORIS MATHEWS (deceased),

Petitioners/Plaintiffs,

v.

PIERCE COUNTY, a political subdivision, and the CITY OF PUYALLUP, a municipal corporation,

Respondents/Defendants.

No. 07-2-11635-0

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION FOLLOWING REMAND HEARING, AND ORDER GRANTING CITY OF PUYALLUP'S MOTION TO VACATE AND MOTION FOR SUMMARY JUDGMENT, AND DISMISSING CASE WITH PREJUDICE

{Clerk's Action Required}

THIS MATTER CAME ON FOR HEARING following a June 4, 2014 "Order Remanding Judgments for Further Proceedings" from the Court of Appeals, Division I (no. 45476-9-II) ("*Remand Order*"), and upon Respondent/Defendant City of Puyallup's Motion to Vacate Judgment/Orders and Motion for Summary Judgment dated October 9, 2014. The remand hearings occurred on January 9, 2015 and June 5, 2015, and a hearing on entry of this order occurred on July 20, 2015, all before the Honorable Jack Nevin.

Respondent/Defendant City of Puyallup ("City") appeared by and through its associated counsel of record, Michael C. Walter of Keating, Bucklin & McCormack, Inc., P.S., and the City is also represented by Steve Kirkelie, City of Puyallup City Attorney, and

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Kevin Yamamoto (formerly City Attorney). Petitioners/Plaintiffs Ted Spice and Plexus Development, LLC, appeared by and through their associated counsel Stephen M. Hansen of the Law Office of Stephen M. Hansen, P.S., and Carolyn A. Lake of Goodstein Law Group, PLLC. Petitioner/Plaintiff Doris E. Mathews is deceased, having died on December 8, 2009. Respondent/Defendant Pierce County was represented by and through Pierce County Deputy Prosecuting Attorney David St. Pierre. Also present for the June 5, 2015, remand hearing were: Seth Goodstein for Petitioners/Plaintiffs; Matt Green of Williams Kastner & Gibbs, a collection attorney, who appeared for the City of Puyallup; John Long of the Law Offices of John A. Long (representing Mark and Donna DuBois in their individual capacities and as their bankruptcy attorney); Bryan Hanis of Hanis Irvine Prothero, PLLC, representing the Estate of Doris E. Mathews and the P.R. for the Estate, Donna DuBois; Ted Spice, Petitioner and Plaintiff; Donna DuBois, P.R. for the Estate of Doris E. Mathews; and Mark DuBois. Present for the July 20, 2015 hearing were Michael C. Walter for Respondent/Defendant City of Puyallup; and Carolyn Lake and Stephen M. Hansen for Petitioners/Plaintiffs Ted Spice and Plexus Development, LLC.

THE COURT CONSIDERED the following pleadings, memoranda, briefs and declarations by the parties:

1) *Defendant City of Puyallup's Motion to Vacate All Orders and Final Judgment Entered After Death of Doris Mathews, December 8, 2009 (per 06-04-14 COA Remand Order)* (October 9, 2014);

2) *Declaration of Michael C. Walter in Support of City of Puyallup's Motion to Vacate Previous Orders and Judgments and Motion for Summary Judgment* (October 9, 2014);

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3) *Defendant City of Puyallup's Motion for Summary Judgment Following Remand from the Court of Appeals* (October 9, 2014);

4) *Defendant City of Puyallup's Motion for CR 11 Attorneys' Fees and Costs* (October 9, 2014);

5) *Declaration of Kevin Yamamoto In Support of Respondent City's Motion for CR 11 Attorney Fees and Costs* (October 2, 2014);

6) *Declaration of Michael C. Walter Re: City's CR 11 Motion for Attorneys' Fees and Costs* (October 9, 2014);

7) *Declaration of Donna DuBois* (September 18, 2014);

8) *Reply of City of Puyallup to Petitioners' Response in Opposition to Puyallup's Motion for Summary Judgment* (November 3, 2014);

9) *Second Declaration of Donna DuBois* (November 3, 2014);

10) *Plaintiffs'' Response in Opposition to Defendant's Motion For CR-11 Attorney's Fees And Costs* (November 6, 2014);

11) *Declaration of Stephen M. Hansen* (November 6, 2014);

12) *Petitioners' Response in Opposition to Puyallup's Motion to Vacate Judgments* (November 6, 2014);

13) *Third Declaration of Petitioner Ted Spice Re: In Opposition to CR-11 Sanctions, and Errata Thereto* (November 6, 2014);

14) *Declaration of Legal Counsel in Opposition to Defendant's Motion for CR-11 Attorney's Fees and Costs* (November 6, 2014);

15) *Combined Reply of City of Puyallup to Petitioners' Response to Puyallup's Motions to Vacate Orders and Judgments and for CR-11 Fees and Costs* (November 10, 2014);

16) *Supplemental Declaration of Michael C. Walter* (December 22, 2014);

17) *Petitioners' Motion to Strike & Objection to Puyallup's "Supplemental Declaration of Michael C. Walters, Re: Puyallup Motion to Vacate, for Summary Judgment and for CR-11 Fees"* (December 29, 2014);

18) *Response/Opposition of City of Puyallup to Plaintiffs' Motion to Strike and Objection to Supplemental Declaration of Michael Walter* (January 7, 2015);

19) *Declaration of Kimberly J. Waldbaum* (January 7, 2015);

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20) *Petitioners' Objection to Puyallup's "Combined Reply of Cuty [sic] of Puyallup to Petitioners' Response to City's Motion for CR-11 Attorneys' Fees and Costs and Motion to Vacate" & Second Declaration of DuBois* (January 7, 2014 [sic]);

21) *Respondent/Defendant City of Puyallup's Motion to Stay All Proceedings (per Chapter 11 Bankruptcy stay)* (January 22, 2015);

22) *Declaration of Michael C. Walter in Support of City of Puyallup's Motion to Stay all Proceedings (Per Ch. 11 Bankruptcy Stay)* (January 22, 2015);

23) *Petitioner Ted Spice's Response Opposing Stay of Proceedings* (January 28, 2015);

24) *Declaration of Petitioner Ted Spice Re: Stay* (January 28, 2015);

25) *Respondent/Defendant City of Puyallup's (1) Notice Striking City's Motion to Stay all Proceedings and (2) Notice of Possible Bankruptcy Stay* (January 29, 2015);

26) *Petitioner Ted Spice's Response to Puyallup's Withdrawal of Motion for Stay of Proceedings* (January 30, 2014 [sic]);

27) *Praecipe for Writ of Execution on Personal Property* (May 22, 2015);

28) *Writ of Execution on Personal Property* (May 22, 2015);

29) *Judgment Creditor's Motion for Break and Enter Order* (May 22, 2015);

30) *Break and Enter Order* (May 22, 2015);

31) *Petitioners' Motion for Order Quashing Writ & Break & Enter Order* (May 28, 2015);

32) *Pierce County Sheriff's Motion for Court Instruction Regarding the Sheriff's Authority to Act Upon a Writ of Execution to Satisfy the 2013 Judgment* (May 28, 2015);

33) *City of Puyallup's: (1) Response in Opposition to Petitioners' Motion for Order Quashing Writ & Break & Enter Order; and (2) Pierce County Sheriff's Motion for Court Instruction Regarding the Sheriff's Authority to Act Upon a Writ of Execution to Satisfy the 2013 Judgment* (June 3, 2015);

34) *City of Puyallup's Statement of Requested Relief and Other Action (for June 5, 2015 Hearing)* (June 3, 2015);

35) *Response on Motion to Dismiss Judgment as to Doris Mathews* (June 3, 2015);

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36) *Petitioners' Reply in Support of Motion to Quash Writ & Order* (June 4, 2015);

37) *Declaration of Legal Counsel in Support of Motion to Quash & in Opposition to Defendant's Motions* (June 4, 2015);

38) *Petitioner Ted Spice's Response Re: Continuation of Hearing on Puyallup's Motions for Dismissal, CR 11 Sanctions & Motion to Vacate* (June 4, 2015);

39) *E-mail from Michael C. Walter to Iva Rockett and attached July 1, 2015 Ruling by Court of Appeals Commissioner Schmidt and excerpts of transcript of June 5 hearing* (July 2, 2015);

40) *Declaration of Legal Counsel with Petitioners' Redlined Comments to Puyallup's Proposed Findings of Fact & Conclusions of Law & Order* (July 17, 2015);

41) _____; and

42) The pleadings and other documents on file with the Court as of this date.

THE COURT DECIDED the issues presented from and following the Court of Appeals' Remand Order, as well as the City of Puyallup's Motion to Vacate and the City of Puyallup's Motion for Summary Judgment, and Petitioners' Motion for Order Quashing Writ and Break and Enter Order, as well as making the specific findings set forth in this Order pursuant to the above-referenced documents and after hearing argument by counsel for all parties as well as legal counsel for the Estate of Doris E. Mathews and Mark and Donna DuBois individually at hearings on the record on January 9, 2015, and June 5, 2015, and argument from counsel for Petitioners/Plaintiffs and the City of Puyallup at the July 20, 2015 hearing.

BASED ON THE FOREGOING and pursuant to the Court of Appeals' Remand Order, statutory and case law authority cited in the briefing to the court and CR 56 and PCLR 7(b)(10), the Court finds, concludes and decides as follows:

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1) Petitioners/Plaintiffs Ted Spice, Plexus Development, LLC and Doris E. Mathews, filed their LUPA Petition and Complaint on or about August 29, 2007, in Pierce County Superior Court under case number 07-2-11635-0;

2) In the LUPA Petition/Complaint, Petitioner/Plaintiff Doris E. Mathews is listed as the "fee title owner" of the property which is the subject of the lawsuit, to wit: real property located at 11003 58th Street Court East, in Pierce County, Washington ("Property");

3) On January 25, 2008, the Honorable Bryan Chushcoff of the Pierce County Superior Court remanded this matter to the Pierce County Deputy Hearing Examiner;

4) On September 12, 2008, the Honorable Judge Chushcoff entered an order on remand and making other rulings in the case;

5) Between September 13, 2008 and February 7, 2013, the court docket for this case shows no court activity of substance;

6) On December 8, 2009, Petitioner/Plaintiff Doris E. Mathews died in Pierce County, Washington;

7) On January 8, 2010, Doris Mathews' daughter, Ms. Donna Dubois, was appointed personal representative ("P.R.") of Ms. Mathews' estate ("Estate") and a probate action for the Estate begins. This probate action is brought under Pierce County cause number 10-4-00037-5;

8) On August 7, 2010, Petitioner/Plaintiff Ted Spice filed an action against the Estate, brought under Pierce County cause number 10-2-11622-8;

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9) On November 7, 2011, attorney Stephen Hansen appeared for Ted Spice in his lawsuit against the Estate of Doris E. Mathews (the case under Pierce County cause number 10-2-11622-8);

10) On October 19, 2012, attorney Stephen Hansen filed a notice of association with attorney Carolyn Lake in this lawsuit;

11) On December 13, 2012, a jury returned a verdict in the estate litigation brought by Ted Spice under case number 10-2-11622-8, awarding Ted Spice a 25% interest and the Estate of Doris Mathews a 75% interest in the property which is the subject of this lawsuit;

12) On February 27, 2013, Petitioners/Plaintiffs filed a Note for Trial Setting, brought by attorney Stephen Hansen;

13) On March 29, 2013, the City filed its (first) Motion for Summary Judgment, seeking dismissal of the case in its entirety;

14) On June 21, 2013, after hearing argument by the attorneys for the parties, the Court granted the City's Motion for Summary Judgment and also ordered that the City was entitled to attorneys' fees under RCW 64.40, in an amount to be determined at a later hearing;

15) On July 1, 2013, the City of Puyallup filed its Motion for Reasonable Attorneys' Fees and Costs under RCW 64.40;

16) On July 12, 2013, the Court heard argument on the City's Motion for Attorneys' Fees under RCW 64.40 and orally ordered that the City was entitled to fees which the court would determine;

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17) On September 10, 2013, the Court denied Petitioners/Plaintiffs' Motion for Reconsideration of the Summary Judgment order;

18) On October 10, 2013, Petitioners/Plaintiffs Ted Spice and Plexus Development, LLC, file a notice of appeal of the June 21, 2013 order granting summary judgment ("first appeal");

19) On December 13, 2013, the Court entered a final judgment and an award on attorneys' fees under RCW 64.40 in the amount of $132,790.65, against Petitioners/Plaintiffs Ted Spice, Plexus Development, LLC and Doris E. Mathews "jointly and severally;"

20) On December 30, 2013, Petitioners/Plaintiffs Ted Spice and Plexus Development, LLC, filed their notice of appeal of the RCW ch. 64.40 attorneys' fees judgment ("second appeal");

21) At the time of the filing of this lawsuit, and at the time of Doris Mathews' death in 2009, Doris Mathews was the fee title owner of the Property at issue in this lawsuit. At the present time, based on the judgment in the estate litigation brought by Ted Spice, the Estate of Doris E. Mathews is the 75% owner of the Property. At all times since the filing of this lawsuit and through the date of this Order, either Doris E. Mathews or her Estate has had a 100% or 75% ownership of the Property, and the Estate continues to hold a 75% undivided ownership of the Property, with Ted Spice currently owning a 25% undivided interest of the Property;

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22) At no time following the death of Doris E. Mathews on December 8, 2009 and through entry of the summary judgment order and the Court's oral decision on the City's motion for attorneys' fees, did Petitioner/Plaintiff Ted Spice or either of the Petitioners/Plaintiffs' attorneys, Stephen Hansen and Carolyn Lake, or anyone acting for them or on their behalf, advise the Court or the parties that Ms. Mathews died. The first notice provided of the death of Doris Mathews by either attorney Carolyn Lake or Stephen Hansen was in a footnote in the Petitioners/Plaintiffs' first notice of appeal on October 10, 2013;

23) At no time prior to receipt of the Petitioners/Plaintiffs' first notice of appeal dated October 10, 2013, was the City of Puyallup, Pierce County or any of their attorneys aware of the death of Doris E. Mathews, which had occurred nearly four years earlier;

24) At no time has Mr. Spice, Plexus Development, LLC, or their attorneys sought to substitute the Estate of Doris E. Mathews for Ms. Mathews in this litigation, and their position is that it is not incumbent upon them to seek or request substitution;

25) After hearing argument from the Estate's and Ms. DuBois' attorneys, and after reviewing the unchallenged declarations of Donna DuBois (September 18, 2014, and November 3, 2014) the Court finds and concludes that the Estate of Doris E. Mathews does not want to become involved in this lawsuit, will not join the lawsuit, does not want to be substituted in this lawsuit or otherwise made a party

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to the lawsuit, and that the personal representative for the Estate, Ms. Donna Dubois, believes the lawsuit to be without merit;

26) There is no legal or equitable basis to force the Estate of Doris Mathews into this case as an unwilling Plaintiff participant;

27) The current ownership of the subject property is split indivisibly between the Estate of Doris E. Mathews, which holds 75% interest, and Ted Spice, who owns a 25% interest. This property and the claims arising from it in this lawsuit are indivisible and non-segregable. There has been no partition action (RCW 7.52) among the Estate and Mr. Spice regarding the subject property;

28) Once Ms. Mathews died December 8, 2009, her then attorneys, Carolyn Lake and – later -- associated attorney Stephen Hansen, lost legal ability to do anything for or take any action regarding Ms. Mathews or her interest in the subject property in this litigation. Accordingly, when Ms. Mathews died, the attorney-client relationship between her and her attorneys, Carolyn Lake and Stephen Hansen, ended and those attorneys were without authority to take any action or do anything in the case regarding her claims or her interest in the subject property; ~~and, further violated their legal and duty under the Rules of Professional Conduct to inform the Court and opposing counsel of her death;~~ 9n 9n

29) The Estate of Doris E. Mathews, which currently holds a 75% interest in the subject property, is a necessary and indispensable party to this litigation. The litigation cannot proceed without the Estate in the case, and the Estate refuses to join in the litigation and wants no part of it. Additionally, the Court is without

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authority to and cannot compel the Estate to be a party to this litigation against its wishes;

30) Because the orders of this court, including all oral rulings and decisions as well as the summary judgment and monetary judgment entered in this case following the death of Doris Mathews were done without the Court's knowledge of the death of Ms. Mathews, and done without the knowledge or consent of Ms. Mathews' Estate, and for the other reasons set forth in the City of Puyallup's Motion to Vacate and its Motion for Summary Judgment dated October 9, 2014, all decisions, orders and judgments of this Court following the death of Doris Mathews on December 8, 2009 are null, void and without any legal effect. Accordingly, all such decisions, orders and the judgments following Ms. Mathews's death must be vacated *ab initio*; and, even if this Court could compel the Estate to be a party it would refuse to do so;

31) Because there is an absence of a necessary and indispensable party to this action – the Estate of Doris E. Mathews which holds a 75% interest in the subject property – there is no legal relief this Court can grant, and no authority to allow this matter to proceed. Accordingly, due to the absence of the Estate as a necessary and indispensable party to this litigation, and for the reasons set forth in the City of Puyallup's October 9, 2014 Motion for Summary Judgment, summary judgment is required, and dismissal of this case with prejudice is warranted.

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NOW, THEREFORE, IT IS HEREBY:

ORDERED, ADJUDGED AND DECREED that all Court actions taken in this case following the death of Doris Mathews on December 8, 2009 – all decisions, orders and judgments -- are **VOID *AB INITIO***. This includes specifically and without limit the Court's June 21, 2013 Order Granting Summary Judgment (the subject of Petitioners/Plaintiffs' first appeal) and the December 13, 2013 Final Judgment (the subject of Petitioners/Plaintiffs' second appeal); and, it is hereby also

ORDERED, ADJUDGED AND DECREED that the City of Puyallup's Motion to Vacate Orders/Judgments dated October 9, 2014, is **GRANTED**; and, it is hereby also

ORDERED, ADJUDGED AND DECREED that the Petitioner's Motion to Quash dated May 28, 2015, is hereby **GRANTED**, since the December 13, 2013 Judgment has been found to be void; and, it is hereby also

ORDERED, ADJUDGED AND DECREED that the City of Puyallup's Motion for Summary Judgment dated October 9, 2014, is hereby **GRANTED**; and, it is hereby also

ORDERED, ADJUDGED AND DECREED that all claims and causes of action in this matter are hereby **DISMISSED WITH PREJUDICE**; and, it is hereby also

ORDERED, ADJUDGED AND DECREED that the Court will address the City of Puyallup's request for Attorney Fees and Costs pursuant to CR 11 at a hearing to be held on a date to be determined. The City has submitted a memorandum addressing the calculation of fees and costs, and declarations in support thereof establishing the amount of fees and costs requested, and a proposed order containing findings to support the requested fee/cost award, and Petitioners/Plaintiffs have filed response briefs and declarations opposing that

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motion for CR 11 fees and costs.

These findings and this order constitute the Court's findings and decisions on the Court of Appeals' Remand Order dated June 4, 2014, and are made following two hearings to comply with the Court of Appeals' Remand Order.

DATED this 20 day of July, 2015.

HONORABLE JACK F. NEVIN, JUDGE

FILED
DEPT. 6
IN OPEN COURT
JUL 20 2015
Pierce County, Clerk
By DEPUTY

Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

Michael C. Walter, WSBA #15044
Attorneys for Respondent/Defendant City of Puyallup

Approved as to form:

GOODSTEIN LAW GROUP, PLLC

Carolyn A. Lake, WSBA #13980
Attorneys for Petitioners/Plaintiffs

LAW OFFICES OF STEPHEN M. HANSEN, P.S.

Stephen M. Hansen, WSBA # 15642
Attorneys for Petitioners/Plaintiffs

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Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX H

APPENDIX H

FILED
DEPT. 6
IN OPEN COURT
APR 15 2016
Pierce County, Clerk
By DEPUTY

THE HONORABLE JACK F. NEVIN

CERTIFIED COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE, PLEXUS DEVELOPMENT, LLC, and DORIS E. MATHEWS,

Petitioners/Plaintiffs,

vs.

PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation,

Respondents/Defendants.

No. 07-2-11635-0

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING CITY OF PUYALLUP CR 11 SANCTIONS AGAINST ATTORNEY CAROLYN A. LAKE

THIS MATTER came before the Court on Respondent/Defendant *City of Puyallup's Renewed Motion for Award of CR 11 Attorneys' Fees and Costs,* dated August 28, 2015. Having reviewed the motion and all materials filed in support and in opposition, along with other pleadings previously filed in this case, having considered the law regarding Rule 11, having heard argument by attorneys for the parties, having rendered an oral decision on December 11, 2015 and further explained that decision at a hearing on January 15, 2016, the Court now: **GRANTS** the motion in part, finding a CR 11 violation against attorney Carolyn Lake and awarding CR 11 fees and costs in the amount of $45,000 against attorney Carolyn A. Lake; **DENIES** the motion in part, finding no CR 11 violation against Plaintiff Ted Spice or attorney Stephen M. Hansen or his law firm; and **ORDERS** that final judgment be entered on the fee award.

Respondent/Defendant City of Puyallup ("City" or "Puyallup"), the moving party, appeared by and through its associated counsel of record, Michael C. Walter of Keating, Bucklin & McCormack, Inc., P.S. Petitioners/Plaintiffs Ted Spice and Plexus Development, LLC and/or Plexus Investments, LLC (collectively "Plaintiffs") appeared by and through their counsel Carolyn A. Lake of Goodstein Law Group, PLLC and Stephen M. Hansen of the Law Office of Stephen M. Hansen, P.S. Petitioner/Plaintiff Ted Spice was separately represented by Attorney C. Tyler Shillito of Smith Alling, P.S. and appeared at the December 11, 2015 hearing only. Attorney Stephen Hansen was separately represented by Richard Kilpatrick of Kilpatrick Group, P.C. Attorney David St. Pierre representing the Respondent/Defendant Pierce County, which is not directly involved in this CR 11 fee motion, did not appear at either the September 25 or December 11, 2015 hearings.

THE COURT CONSIDERED the following pleadings, memoranda, briefs and declarations by the parties:

1. *Defendant City of Puyallup's Renewed Motion for CR 11 Attorneys' Fees and Costs* (August 28, 2015);
2. *Declaration of Michael C. Walter in Support of Defendant City of Puyallup's Renewed Motion for CR 11 Attorneys' Fees and Costs* (August 28, 2015);
3. *Supplemental Declaration of Kevin Yamamoto in Support of Defendant City of Puyallup's Renewed Motion for CR 11 Attorneys' Fees and Costs* (August 28, 2015);
4. *Defendant City of Puyallup's Motion for Summary Judgment Following Remand from the Court of Appeals* (October 9, 2014);
5. *Defendant City of Puyallup's Motion to Vacate All Orders and Final Judgment Entered After Death of Doris Mathews, December 8, 2009* (October 9, 2014);
6. *Declaration of Michael C. Walter in Support of City of Puyallup's Motion to Vacate Previous Orders and Judgments, and Motion for Summary Judgment* (October 9, 2014);
7. *Declaration of Donna DuBois* (September 18, 2014);

8. *Reply of City of Puyallup to Petitioners' Response in Opposition to Puyallup's Motion for Summary Judgment* (November 3, 2014);

9. *Second Declaration of Donna DuBois* (November 3, 2014);

10. *Plaintiffs' Response in Opposition to Defendant's Motion For CR 11 Attorney's Fees And Costs* (November 6, 2014);

11. *Declaration of Stephen M. Hansen* (November 6, 2014);

12. *Petitioners' Response in Opposition to Puyallup's Motion to Vacate Judgments* (November 6, 2014);

13. *Third Declaration of Petitioner Ted Spice Re: In Opposition to CR 11 Sanctions, and Errata Thereto* (November 6, 2014);

14. *Declaration of Legal Counsel in Opposition to Defendant's Motion for CR 11 Attorney's Fees and Costs* (November 6, 2014);

15. *Combined Reply of City of Puyallup to Petitioners' Response to Puyallup's Motions to Vacate Orders and Judgments and for CR 11 Fees and Costs* (November 10, 2014);

16. *Supplemental Declaration of Michael C. Walter* (December 22, 2014);

17. *Petitioners' Motion to Strike & Objection to Puyallup's "Supplemental Declaration of Michael C. Walters, Re: Puyallup Motion to Vacate, for Summary Judgment and for CR 11 Fees"* (December 29, 2014);

18. *Response/Opposition of City of Puyallup to Plaintiffs' Motion to Strike and Objection to Supplemental Declaration of Michael Walter* (January 7, 2015);

19. *Declaration of Kimberly J. Waldbaum* (January 7, 2015);

20. *Petitioners' Objection to Puyallup's "Combined Reply of Cuty [sic] of Puyallup to Petitioners' Response to City's Motion for CR 11 Attorneys' Fees and Costs and Motion to Vacate" & Second Declaration of DuBois* (January 7, 2014 [sic]);

21. *Stephen M. Hansen's Memorandum Opposing Puyallup's CR 11 Sanction Motion* (September 17, 2015);

22. *Declaration of Stephen M. Hansen Opposing CR 11 Sanctions* (September 17, 2015);

23. *Declaration of Brian H. Krikorian* (September 17, 2015);

24. *Plaintiffs Spice and Plexus' Response in Opposition to Puyallup's Motion for CR 11 Terms* (September 17, 2015);

25. *Declaration of Legal Counsel in Opposition to CR 11 Sanction* (September 17, 2015);

26. *Declaration of John Strait* (September 17, 2015);

27. *Combined Reply in Support of City of Puyallup's Motion for CR 11 Fees and Costs* (September 24, 2015);

28. *Reply Declaration of Michael C. Walter in Support of City of Puyallup's Renewed Motion for CR 11 Fees and Costs* (September 24, 2015);

29. *City of Puyallup's Motion to File Over-Length Combined Reply in Support of City of Puyallup's Motion for CR 11 Fees and Costs* (September 24, 2015);

30. *Supplemental Authorities & Scheduling Information* (September 29, 2015);

31. *City of Puyallup's Statement of Supplemental Authorities in Support of its Motion For Cr 11 Fees and Costs* (September 30, 2015);

32. *Plaintiffs' Supplemental Response in Opposition to Puyallup's Motion for CR 11 Terms* (October 9, 2015);

33. *Motion for Ruling on Smith Alling, P.S.'s Continued Representation of Petitioner Ted Spice*, dated December 30, 2015;

34. *Declaration of Tyler Shillito,* dated December 30, 2015;

35. *Motion to Reopen Proceedings for Additional Discovery* dated December 30, 2015;

36. *Declaration of Ted Spice in Support of Motion to Reopen Proceedings for Additional Discovery* dated December 11, 2015;

37. *City of Puyallup's Response in Opposition to Motion To Reopen Proceedings For Additional Discovery,* dated January 13, 2016;

38. *Declaration of Michael C. Walter in support of City Of Puyallup's Response In Opposition To Motion To Reopen Proceedings For Additional Discovery,* dated January 13, 2016;

39. *Hansen's Response to Smith Alling, P.S.'s Motion to Continue Representation of Petitioner Ted Spice and Conduct Discovery*, dated January 8, 2016;

40. *Plexus' Response to Smith Alling, P.S.'s Motion to Continue Representation of Petitioner Ted Spice and Conduct Discovery*, dated January 12, 2016;

41. *City Of Puyallup's Alternative (1) Motion To Amend July 20, 2015 Order And December 13, 2013 Ch. 64.40 Order And Judgment As To Ted Spice And Plexus, Or (2) Renewed Motion For Ch. 64.40 Attorneys' Fees As To Ted Spice And Plexus*, dated January 28, 2016;

42. *Declaration of Michael C. Walter in Support of City of Puyallup's Alternative (1) Motion to Amend July 20, 2015 Order And December 13, 2013 Ch. 64.40 Order And Judgment As To Ted Spice And Plexus, Or (2) Renewed Motion For Ch. 64.40 Attorneys' Fees As To Ted Spice And Plexus,* dated January 28, 2016;

43. *City of Puyallup's Alternative (1) Motion to Amend July 20, 2015 Judgment and Ch. 64.40 Judgment as to Ted Spice and Plexus, or (2) Renewed Motion for Ch. 64.40 Attorneys' Fees as to Ted Spice and Plexus,* dated February 16, 2016;

44. *Declaration of Michael C. Walter in Support of City of Puyallup's Alternative (1) Motion to Amend July 20, 2015 Order and December 13, 2013 Ch. 64.40 Order and Judgment as to Ted Spice and Plexus, or (2) Renewed Motion for Ch. 64.40 Attorneys' Fees as to Ted Spice and Plexus,* dated February 16, 2016;

45. *City of Puyallup's Motion for Presentation and Entry of (1) Order Granting City of Puyallup CR 11 Sanctions, and (2) Final Judgment,* dated February 16, 2016;

46. *Declaration of Michael C. Walter in Support of City of Puyallup's Motion for Presentation and Entry of (1) Order Granting City of Puyallup CR 11 Sanctions, and (2) Final Judgment,* dated February 16, 2016;

47. *Declaration of Counsel Proving Notice of Appeals Court Decision in Estate of Doris Mathews Case,* dated March 8, 2016;

48. *Spice Response Through Counsel Shillito Opposing the City of Puyallup's Motion to "Amend" or Alternatively to "Re-Impose" Fees,* dated March 22, 2016;

49. *Plexus Spice Response Opposing Puyallup Motion to "Amend" or Alternatively to "Re-Impose" Fees & Motion to Accept Slightly Overlength Brief,* dated March 22, 2016;

50. *Hansen's Opposition to Entry of Puyallup's Proposed Order on Puyallup's Motion for Sanctions & Supporting Hansen's Order,* dated March 22, 2016;

51. *Declaration Dick Kilpatrick Opposing Presentation of Puyallup's Proposed Order on Sanctions; and Supporting Hansen's Presentation of Order and Judgment on Sanctions,* dated March 22, 2016;

52. *Hansen's Opposition to Puyallup's Attempt to Have Judgment Against Spice, After Puyallup Requested and Got the Court to Vacate that Judgment,* dated March 22, 2016;

53. *Petitioner Plexus & Spice Response Opposing Entry of Puyallup's Proposed Order on Motion for CR 11 Terms,* dated March 23, 2016;

54. *Petitioner Plexus & Spice Response Opposing Entry of Puyallup's Proposed Order on Motion for CR 11 Terms Errata, dated March 23, 2016;*

55. *Motion for Presentation of Order Regarding City of Puyallup's Motion for Sanctions Against Stephen Hansen,* dated March 28, 2016; and

56. The pleadings and other documents on file with the Court as of this date.

The Court heard argument on this motion on September 25, 2015, and was fully advised, and announced its decision on December 11, 2015, and further explained its decision at a related hearing on January 15, 2016.

The Court now makes the following findings of fact and conclusions of law supporting the Rule 11 sanction award in favor of the City of Puyallup and against Plaintiffs' counsel Carolyn A. Lake. The Court makes no CR 11 sanction award against Petitioner/Plaintiff Ted Spice, attorney Stephen M. Hansen, his law firm or the Goodstein Law Group PLLC.

I. FINDINGS OF FACT

1. Plaintiffs Doris Mathews, Ted Spice and Plexus Development, LLC[1], filed this LUPA action, with an accompanying complaint for declaratory judgment damages pursuant to Chapter 64.40 RCW, against the City of Puyallup and Pierce County on August 29, 2007. The LUPA petition/complaint identified Petitioner/Plaintiff Doris E. Matthews as the "fee title owner" of the property which is the subject of this lawsuit. That property is located at 11003 58th Street Court East, in Pierce County, Washington.

2. The Plaintiffs' initial attorney was (and remains) Carolyn A. Lake of Goodstein Law Group PLLC.

[1] The original caption for this lawsuit, as well as virtually all other captions in the case, identify Plexus "Development" LLC as one of the Petitioners/Plaintiffs. The City advised this Court previously that its investigation revealed no active business entity under the name "Plexus *Development*, LLC." Plaintiffs' counsel later claimed that this was a mistake and that the actual entity that should have been identified is Plexus "*Investments*" LLC (not Development). Throughout this document, as well as all others by the City, where the entity Plexus "Development" is used, it shall refer to both Plexus entities: Plexus Development LLC and Plexus Investments LLC.

3. Plaintiff Doris Mathews (who was listed as the fee title owner of the property when the LUPA Petition/Complaint was filed), died on December 8, 2009.

4. On January 8, 2010, Doris Mathews' daughter, Ms. Donna Dubois, was appointed personal representative ("P.R.") of Ms. Mathews' estate ("Estate") and a probate action for the Estate began. This probate action was brought under Pierce County cause number 10-4-00037-5.

5. On August 7, 2010, Ted Spice filed an action against the Estate, filed under Pierce County cause number 10-2-11622-8.

6. On November 7, 2011, attorney Stephen M. Hansen appeared for Ted Spice in his lawsuit against the Estate (the case under Pierce County cause number 10-2-11622-8.

7. On October 19th, 2012, attorney Stephen M. Hansen served the City with a notice of association with attorney Carolyn Lake in this lawsuit. He did not file the notice at that time. While Mr. Hansen had represented Mr. Spice in an action against the estate, no mention was made at the time of his association in the current law suit, of Ms. Mathews' death. While not entirely clear, one can reasonably infer that Mr. Hansen's notice of appearance was only on behalf of Mr. Spice (in the current cause).

8. On September 17, 2012, the Jury returned a verdict in the Estate litigation brought by Ted Spice (under case number 10-2-11622-8). The verdict allocated ownership of the property at issue in this case 75% to the Estate and 25% to Ted Spice. That ownership allocation has not changed since entry of the verdict in the Estate litigation.

9. Between 2012 to January-February 2013, Plaintiffs' attorneys (Carolyn Lake and Stephen M. Hansen) attempted to settle the case with the City. These were not successful.

10. On February 27, 2013, Plaintiffs filed a Note for Trial Setting in this case, brought by attorney Stephen M. Hansen. The trial setting request was denied.

11. On March 29, 2013, the City filed its (first) Motion for Summary Judgment, seeking dismissal of the case in its entirety. Plaintiffs' attorneys responded, but the attorneys made no mention that their client, Plaintiff Doris Mathews, was deceased.

12. On June 21, 2013, after hearing argument by the attorneys for the parties, the Court granted the City's Motion for Summary Judgment and also ordered that the City was entitled to attorneys' fees under RCW Ch. 64.40, in an amount to be determined at a later hearing.

13. On July 1, 2013, the City filed its Motion for Reasonable Attorneys' Fees and Costs under RCW 64.40.020. Plaintiffs' attorneys responded, but did not mention that their client, Doris Mathews was deceased. Also on that date, Plaintiffs' attorneys filed a Motion for Reconsideration of the Summary Judgment Order, but they did not disclose that Ms. Mathews was deceased.

14. On July 12, 2013, the Court heard argument on the City's Motion for Attorneys' Fees under RCW Ch. 64.40 and orally ordered that the City was entitled to attorneys' fees in an amount to be determined.

15. On September 10, 2013, the Court denied Plaintiffs' Motion for Reconsideration of the Summary Judgment.

16. On December 13, 2013, final judgment was entered in favor of the City on its RCW Ch. 64.40 claim. In this final judgment, the Court awarded the City fees and costs in the amount of $132,790.65. Attorneys for the Plaintiffs allow the judgment to be entered against Plaintiffs Ted Spice, Plexus Development, LLC and Doris E. Mathews "jointly and

severally," with Doris Mathews' name in the caption and her listed as a debtor, but do not indicate anywhere in the final judgment that Ms. Mathews was deceased.

17. Between December 9th 2009 and October of 2013 no mention of Mathew's death was made by any counsel representing Spice and/or Mathews, in any context. More specifically the docket in this case shows that between December 9, 2009 (the day after Ms. Mathews died) and December 13, 2013 (entry of the final judgment in this matter), approximately seven motions were noted or heard, at least four court hearings were held, and hundreds of pages of briefing and evidentiary materials were submitted to Judges Culpepper and Nevin. Most but not all of the pleadings submitted during this time period show Doris E. Mathews as a plaintiff in the caption of the pleading. None of the pleadings or other documents submitted by Plaintiffs' attorneys reference or disclose that Ms. Mathews was deceased, that she had died years earlier, or that the attorneys were signing for fewer than all three of the named plaintiffs, or that they are not signing for Doris E. Mathews.

18. Prior to their notice of appeal on October 10, 2013, Plaintiffs' attorneys never provided notice of or in any way informed the Court or the Defendants that Doris Mathews, a Plaintiff and their client, was deceased, or that she had died years earlier.

19. The final judgment on the City's RCW Ch. 64.40 fee request in the amount of $132,790.65 was recorded against property originally wholly owned by Ms. Mathews and now owned by her Estate (75%) and Mr. Spice (25%). This final judgement was also recorded against property owned by Plaintiff Ted Spice.

20. In the Estate litigation, PCSC Case No. 10-2-11622-8, Plaintiff Ted Spice sued the Estate of Doris Mathews regarding ownership of the property at issue in this case,

the property at 11003 58th St Ct E in 2010; thus Mr. Spice was also aware that Doris Mathews had died in 2009.

21. Neither Mr. Spice, nor Attorneys Lake or Hansen approached the Estate or its P.R., Donna DuBois, about substituting the Estate for Ms. Mathews in this case. At no time have the Plaintiffs in this case or their attorneys made a motion to substitute the Estate for Doris Mathews, or otherwise sought to bring the Estate into this litigation.

22. The Estate (through its P.R., Donna DuBois) is understandably dismayed that a judgment of $132,790.65 was entered in this case against Ms. Mathews without her knowledge or the knowledge, participation or consent of the Estate. The Estate through its Personal Representative Donna Dubois declines to participate in this litigation, and will not allow substitution or joinder of the Estate in the litigation.

23. Following the Court's oral ruling awarding RCW Ch. 64.40 to the City, the Plaintiffs appealed to the Court of Appeals, Division II. *See* COA # 45476-9-II, filed on October 10, 2013. For the first time, Plaintiffs' attorney Carolyn Lake gave notice that her client, Doris Mathews, was deceased. She conveyed this information to the Appellate Court by way of a footnote in her Notice of Appeal. At this point, Ms. Mathews had been deceased for nearly four years. The reference to Ms. Mathews' death in the notice of appeal did not indicate when Ms. Mathews had died, when Ms. Lake learned of the death, or why Ms. Mathews' death was not previously disclosed to the Court or the Defendants.

24. On February 14, 2014, the City filed a motion with the Court of Appeals to dismiss the October 10, 2013 appeal based on the death of Doris Mathews, a 75% owner of the subject property, that her death was never disclosed to the Court or the parties, and that the Trial Court had unknowingly issued various orders, made rulings, and entered a

judgement for $132,790.65 against a deceased person (Ms. Mathews).

25. June 4, 2014, the Court of Appeals issued an Order on Remand, remanding the matter to the trial Court to "readdress the 2013 Judgments in light of Mathews' 2009 death."

26. On October 9, 2014, the City filed three motions to follow up on the Appellate Court's Remand Order and to seek dismissal of the remanded case based on, *inter alia*, lack of a necessary and indispensable party – the Estate of Doris Mathews, which holds title to a 75% interest in the subject property. The three City motions were: (1) *Defendant City of Puyallup's Motion to Vacate All Orders and Final Judgment Entered After Death of Doris Mathews, December 8, 2009 (per 06-04-14 COA Remand Order)*; (2) *Defendant City of Puyallup's Motion for Summary Judgment Following Remand from the Court of Appeals;* and (3) *Defendant City of Puyallup's Motion for CR 11 Attorneys' Fees and Costs.*

27. On January 9, 2015, this Court held the first of several fact-finding hearings to comply with Court of Appeals Remand Order.

28. On June 5, 2015, this Court held a second fact-finding hearing to comply with Court of Appeals Remand Order. Oral findings of fact and conclusions of law were made, and an oral decision granting the City's Motion to Vacate and Motion for Summary Judgment, and granting Plaintiffs' Motion to Quash Writ, and a hearing was scheduled on the City's CR 11 motion for sanctions.

29. On June 10, 2015, Plaintiffs (Appellants) filed with the Court of Appeals a Motion for Emergency Order Staying Trial Court's Pending Action.

30. On July 1, 2015, Court of Appeals Commissioner Schmidt denied the

Appellants' motion to stay the trial Court's entry of orders following remand, ruled that the law of the case doctrine did not bar entry of the trial Court's orders, and noted that the Appellants could object to the scope of the orders when the case returns to the Court of Appeals' jurisdiction following entry of those trial Court orders.

31. On July 6, 2015, this Court set another hearing to enter a remand order per Commissioner Schmidt's July 1 ruling. Later that day, Appellants filed with the Court of Appeals a Motion to Modify the Commissioner's ruling.

32. On July 20, 2015, this Court held a third fact-finding hearing to further address and resolve the Court of Appeals Remand Order and to enter a final order on remand. Following that hearing, this Court entered its *Findings of Fact, Conclusions of Law and Decision Following Remand Hearing, and Order Granting City of Puyallup's Motion to Vacate and Motion for Summary Judgment, and Dismissing Case with Prejudice.*

33. After lengthy argument and voluminous briefing by all parties, the Court denied Plaintiffs' motions opposing both the motion to vacate and the renewed motion for summary judgment—this Court ruled on two of those motions on July 20, 2015, holding as follows:

> Because the orders of this Court, including all oral rulings and decisions as well as the summary judgment and monetary judgment entered in this case following the death of Doris Mathews were done without the Court's knowledge of the death of Ms. Mathews, and done without the knowledge or consent of Ms. Mathews' Estate, and for the other reasons set forth in the City of Puyallup's Motion to Vacate and its Motion for Summary Judgment dated October 9, 2014, all decisions, orders and judgments of this Court following the death of Doris Mathews on December 8, 2009 are null, void and without any legal effect. Accordingly, all decisions, orders and the judgments following Ms. Mathews' death must be vacated *ab initio*.
> On August 14, 2015, the Court of Appeals denied Appellants' Motion to Modify.

34. On August 17, 2015, Plaintiffs/Appellants filed their Third Notice of Appeal.

35. On September 25, 2015, this Court heard argument on the City's Renewed Motion for Rule 11 Attorneys' Fees and Costs.

36. On December 11, 2015, this Court held a specially set hearing at which it announced and explained its decision on the City's CR 11 Motion, and orally ruled, *inter alia*, that:

a. The conduct, actions and representations by Plaintiff Ted Spice did not amount to a violation of CR 11, and that he was not liable for CR 11 sanctions;

b. The conduct, actions and representations by attorney Stephen M. Hansen did not amount to a violation of CR 11, and that neither he nor his law firm was liable for CR 11 sanctions;

c. The conduct, actions and representations by attorney Carolyn Lake did violate CR 11, and that she and her law firm, Goodstein Law Group PLLC, were liable for sanctions under CR 11 in the amount of $45,000;

d. The original judgment for RCW Ch. 64.40 attorneys' fees and costs as against Plaintiff Ted Spice alone is not necessarily voided, and that that specific question has not been presented to the Court;

e. At a hearing on January 15, 2016, the Court reaffirmed the decision it announced at the December 11 hearing, and made clear that the basis for the $45,000 CR 11 fee award against Ms. Lake (and her law firm) was because she represented someone who was deceased and that she never told the Court that Ms. Mathews had died.

37. The record shows that the City has been represented throughout this litigation by the following attorneys: Michael C. Walter of the law firm of Keating, Bucklin & McCormack, Inc., P.S. and Kevin Yamamoto, former Puyallup City Attorney and current Puyallup City Manager, both as associated counsel.

38. On August 28, 2015, the City of Puyallup filed its Renewed Motion for CR 11 Attorneys' Fees and Costs, requesting total attorneys' fees and costs of $312,181.86. These fees and costs are specified in detail in the supporting declarations of Michael C. Walter and the supplemental declaration of Kevin J. Yamamoto, which the Court has considered. A summary of those fees and costs as requested by the City is as follows:

2010 Fees of attorney Walter (@ $232/hr.)	$533.60
2011 Fees of attorney Walter (@ $237/hr.)	$5,190.30
2012 Fees of attorney Walter (@ $245/hr.)	$5,953.50
2013 Fees of attorney Walter (@ $253/hr.)	$99,606.10
2014 Fees of attorney Walter (@ $265/hr.)	$45,739.00
2015 Fees of attorney Walter (@ $273/hr.)	$45,918.60
2014-15 Fees of attorney Waldbaum (@ $247/hr.)	$39,964.60
Fees of Attorney Yamamoto from December 9, 2009 through present (310.1 hours @ 200/hr)	$61,780.00
COSTS:	$7,496.16
TOTAL ATTORNEYS' FEES AND COSTS **REQUESTED:**	**$312,181.86**

39. The Court does not award the full amount of fees and costs requested by the City ($312,181.86), in part for the following reasons: (a) Much of the work reflected in the City's fee request would have been done even if Ms. Mathews' death had been disclosed promptly after she died; (b) CR 11 sanctions are not intended to be a fee recovery mechanism or fee shifting endeavor; (c) CR 11 sanctions are about deterrence; (d) the amount awarded ($45,000) is reasonable and appropriate to cover the costs that the City did incur for work that its attorneys wouldn't have had to do if they had known that Ms.

Mathews had died, and to correct the improperly entered orders and judgment.

40. Instead the Court awards the City CR 11 sanctions in the amount of $45,000, which the Court finds to be a fair and reasonable amount given the nature and extent of this litigation and how far it was allowed to proceed before the fact of Ms. Mathews' death was disclosed, for Ms. Lake's failure to make a reasonable inquiry into the death of her client, Ms. Mathews, and as a sanction for deterrence. This amount is a sanction award, and not intended as attorneys' fees and costs incurred by the City for the work of its attorneys (Walter, Yamamoto and Waldbaum). However, this sanction award may have the effect of offsetting some of the fees and costs attributable to Ms. Lake's failure prior to filing the first notice of appeal on October 10, 2013 to advise this Court or the Defendants of the death of Ms. Mathews, which violated CR 11, as well as her misrepresentation on pleadings filed with this Court intimating that Ms. Mathews was still alive, and her continued signing of pleadings on her behalf following her death in December 2009, and for the other reasons announced in the Court's oral decision on December 11, 2015. At least this amount of attorneys' fees and costs would not have been incurred but-for the actions and omissions by Plaintiffs' attorney Carolyn Lake following the death of her client, Plaintiff Doris Mathews.

41. Attorney Lake's actions following the death of Doris Mathews, without advising the Court or the Defendants of her client's death, were advanced without reasonable cause or inquiry within the meaning of CR 11, thus entitling the City to $45,000 in sanctions, which may also offset some of the City's attorneys' fees and costs, and for the reasons announced in the Court's oral decision on December 11, 2015. In making this determination, the Court specifically finds:

a. That all substantive actions taken in this case relating to Doris Mathews, following her death on December 8, 2009, were null, void and without legal effect;

b. That Ms. Mathews, and following her death her Estate, is a necessary and indispensable party to this lawsuit and to recovery under either the LUPA claim or the Ch. 64.40 damages claim (the Court reaffirms its prior rulings in this regard);

c. Plaintiffs' counsel Carolyn Lake had a duty to engage in a reasonable inquiry about the status (or death) of her client, Ms. Doris E. Mathews, and failed to do so. Ms. Lake has offered no explanation as to why she did not make this inquiry; nor has she advised the Court when Ms. Lake knew of the death of her client Ms. Mathews;

d. Ms. Lake knew or should have known after a reasonable inquiry by at least 2012 when attorney Stephen Hansen associated in this case following his lawsuit against the Estate, that her client, Ms. Mathews, was deceased. This fact was significant; it was significant to the Court, to the City and to the other litigants;

e. Plaintiffs' counsel Carolyn Lake also had a duty to advise this Court and the other parties promptly of the death of her client, Doris E. Mathews, who at the time of her death, was the fee title owner of the subject property, and that she failed to advise this Court or the parties of her death until, at the very earliest, October 10, 2013. To date, Ms. Lake has not explained why she never advised the Court of Ms. Mathews' death;

f. Ms. Lake never sought to amend the caption to delete Ms. Mathews name, or to otherwise indicate that she had died, thus creating pleadings that were misleading and arguably false, and therefore a violation of CR 11;

g. Ms. Lake continued to sign each and every pleading following Ms. Mathews' death as if she was still alive, without any indication in her signature or on the documents that Ms. Mathews was deceased, or that she was no longer representing her, again, in violation of CR 11;

h. Ms. Lake continued to vigorously litigate this case following the death of Plaintiff Mathews, without legal authority to do so; and thus filed pleadings that were not well-grounded in fact and without legal effect;

i. Ms. Lake's actions in litigating the case after Ms. Mathews' death were in violation of CR 11;

j. The pleadings filed by Ms. Lake after the death of Doris Mathews were not objectively reasonable and were prepared without a reasonable inquiry or investigation, and were without basis in fact or law, in violation of CR 11;

All of the pleadings filed by Ms. Lake were on her law firm's pleading paper, and identified her law firm – Goodstein Law Group PLLC; and

k. The fact of Mathews' death was important, it mattered, it is serious, and it was a violation of CR 11.

42. By signing the pleadings following the death of Doris Mathews and failing to disclose her death to the Court, Ms. Lake breached her certification obligations under CR 11, thus entitling the City to sanctions as a deterrent and to partially offset some of the expenses incurred by the City that would not have been incurred had Ms. Mathews' death been promptly disclosed. The pleadings and documents by Attorney Carolyn Lake following the death of Doris Mathews were not well grounded in fact and were not warranted by existing law because she never disclosed to the Court that her client, a principal owner of the subject property, was deceased. Ms. Lake signed and presented pleadings she either knew, or should have known were false. In doing so she filed pleadings that were at least without merit and at most were false. These pleadings were misleading to the Court and to counsel. Ms. Lake failed to conduct the necessary reasonable inquiry before signing them.

43. In arriving at its decision, the Court had no information concerning the following:

a. The terms by which Ms. Lake's firm was retained to represent Ms. Mathews' interests, along with the interests of Mr. Spice and Plexus;

b. The date Ms. Lake learned that Ms. Mathews was deceased;

c. That Mr. Spice was a 25 percent owner of the property, that the Estate was a 75 percent owner of the property, or even that there was a split in ownership of the property following the verdict in the Estate litigation;

d. Why Ms. Lake did not move to substitute the Estate for Ms. Mathews, or bifurcate claims in the case, or file an amended complaint, or take any other Court action to remove the deceased Doris Mathews from the lawsuit.

44. While the City is entitled to an award of sanctions under CR 11, the Court finds that neither the Rule nor interpretative case law or other authorities provide benchmarks or guidance as to how to compute sanctions under CR 11. CR 11 does not require a specific formula or method to calculate monetary sanctions.

II. CONCLUSIONS OF LAW

1. The conduct, actions and representations by Plaintiff Ted Spice did not amount to a violation of CR 11, thus he is not liable for CR 11 sanctions.

2. The conduct, actions and representations by attorney Stephen M. Hansen did not amount to a violation of CR 11, thus neither he nor his law firm is liable for CR 11 sanctions.

3. The conduct, actions and representations by Attorney Carolyn Lake, as outlined in the Findings of Fact section of this Order, did violate CR 11, and she is liable for sanctions under CR 11 in the amount of $45,000.

4. The original judgment, entered on December 13, 2013, for RCW Ch. 64.40 attorneys' fees and costs as against Plaintiff Ted Spice and Plexus is not necessarily voided, and that that specific question has not been presented to the Court.

5. CR 11 and interpretive authorities establish some general rules regarding CR 11 violations and sanctions, including (but not limited to) the following:

a. A violation of CR 11 is not the same as a violation of the Rules of Professional Conduct. Sometimes they overlap, sometimes not, but they are not synonymous;

b. Case law authority interpreting Federal Rule of Civil Procedure 11 is useful in interpreting and applying the State's counterpart – CR 11;

c. CR 11 was adopted to deal with baseless filings and to curb abuses in the legal system.

d. CR 11 does not just apply to filings; it applies to every pleading, every written motion, every legal memorandum filed or served during any litigation, and it applies throughout the entirety of the litigation;

e. If an attorney signs a pleading, motion or other document in violation of the rule, the Court can impose an appropriate sanction against the attorney, the person represented, or both;

f. At a minimum, CR 11 requires attorneys to undertake a reasonable inquiry into the facts and the law before filing any pleading or document;

g. An attorney's inquiry into the law and the facts must be objectively reasonable under the circumstances;

h. The Court has broad discretion to impose an appropriate sanction under CR 11, and to decide against whom the sanctions should be imposed;

i. Sanctions under CR 11 are intended to deter and punish sanctionable conduct, but are not a fee-shifting mechanism; and

j. CR 11 sanctions are available against both an attorney and the attorney's law firm, However, the court is satisfied by the representations of Ms. Lake explaining the nature of her ownership interest in the Goodstein Law Group PLLC, that it is appropriate to exclude that entity from the imposition of CR 11 sanctions. There court therefore imposes these sanctions against only Ms. Lake.

6. Neither CR 11 nor interpretative case law or other authorities provide benchmarks or guidance as to how to compute damages or sanctions under CR 11. In other fee request contexts, one method is to use a Lodestar analysis to determine the reasonableness of a fee request. However, CR 11 does not require this formula, nor does the Rule mandate any other or specific method to calculate damages sanctions.

7. The Court concludes the City of Puyallup is entitled to a total award of $45,000 in sanctions due to Attorney Carolyn Lake's failure to advise either this Court or the attorneys for Defendants of the death of Ms. Doris Mathews, a plaintiff in this case, an owner of the subject property, and a client of Carolyn Lake and her law office. This award is made under CR 11 based on the Court record to date, the Findings and Conclusions set forth above, and the reasons announced in the Court's December 11, 2015 and January 15, 2016 hearings.

III. ORDER RE: CR 11 ATTORNEYS' FEES AND COSTS

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant City of Puyallup is hereby awarded $45,000 in as a sanction pursuant to CR 11 against Plaintiffs' counsel Carolyn A. Lake, [redacted] 9/1

DATED this 15 day of April, 2016.

HONORABLE JACK F. NEVIN
Judge of the Pierce County Superior Court

FILED
DEPT. 6
IN OPEN COURT
APR 15 2016
Pierce County, Clerk
By _____
DEPUTY

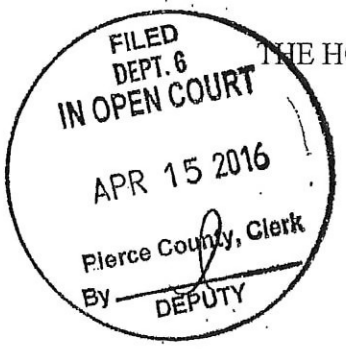
Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX I

APPENDIX I

THE HONORABLE JACK F. NEVIN



CERTIFIED COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE AND PLEXUS DEVELOPMENT, LLC, and DORIS E. MATHEWS

Petitioners,

v.

PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation,

Respondents.

No. 07-2-11635-0

ORDER GRANTING CITY OF PUYALLUP AN AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS PURSUANT TO RCW CH. 64.40

- THIS MATTER originally came before the Court on Respondent/Defendant City of Puyallup's *Motion for Determination of Attorneys' Fees and Costs, and Entry of Final Judgment in Favor of the City of Puyallup,* dated July 1, 2013.

- Thereafter, through a series of unforeseeable procedural events, the Court vacated judgements against Petitioner Spice and Doris E Mathews. On July 20th 2015, the court again granted Summary Judgment in favor of the City of Puyallup, however only against Petitioner Spice, having found that Petitioner had failed to include an indispensable party, namely the estate of Doris Mathews. That ruling was based on the fact (unbeknownst to the Court

and the City) that Doris Mathews died more than three years before the court granted the Summary Judgement of July 1 2013.

- Having reviewed the motion and all materials filed in support and opposition, and having considered the Lodestar factors, the Court, based upon its order of Summary Judgment granted July 20th 2015 now GRANTS the motion as against only Ted Spice, Plexus Development LLC and Plexus Investments LLC (note Doris Mathews), but reduces the requested fees, awards fees and costs to the City of Puyallup, and authorizes entry of final judgment as set forth below.[1]

I. INTRODUCTION AND EVIDENCE RELIED UPON

Respondent/Defendant City of Puyallup ("City" or "Puyallup"), the moving party, appeared by and through its associated counsel of record, Michael C. Walter of Keating, Bucklin & McCormack, Inc., P.S., and Kevin J. Yamamoto, City of Puyallup City Attorney. Petitioners/Plaintiffs Ted Spice, Plexus Development, LLC, and Doris E. Mathews (collectively "Plaintiffs") appeared by and through their associated counsel Stephen M. Hansen of the Law Office of Stephen M. Hansen, P.S., and Carolyn A. Lake of Goodstein Law Group, PLLC. Respondent/Defendant Pierce County was previously dismissed from this case and did not respond to the City's motion.

THE COURT CONSIDERED the following pleadings, memoranda, briefs and declarations by the parties:

1) *Order Granting Summary Judgment, Dismissing Case with Prejudice and Awarding Attorneys' Fees,* dated June 21, 2013;

[1] A further history of this case and the court's analysis on this point is attached hereto as Appendix I and incorporated by this reference.

2) *Defendant City of Puyallup's Motion for Determination of Attorneys' Fees and Costs, and Entry of Final Judgment in favor of the City of Puyallup,* dated July 1, 2013;

3) *Declaration of Michael C. Walter Re: City's Request for Attorneys' Fees and Costs,* dated July 1, 2013;

4) *Declaration of Kevin Yamamoto Regarding Attorney Fees and Costs,* dated June 28, 2013;

5) *Petitioners' Response Opposing Respondents' Requested Attorney Fees,* dated August 7, 2013;

6) *Defendant City of Puyallup's Reply in Support of Motion for Determination of Attorneys' Fees and Entry of Final Judgment,* dated August 8, 2013;

7) The Court's September 21, 2013 letter-decision (attached hereto as **Exh. A**); and

8) The pleadings and other documents on file with the Court as of April 15 2015.

THE COURT DECIDED this Motion after hearing argument by counsel for the City of Puyallup and the Plaintiffs on April 15, 2016. The court has also considered selected case law cited by all parties in support of their respective positions. The court's analysis and conclusions based upon this authority is attached hereto as Appendix I to this order and is incorporated by this reference.

II. FINDINGS OF FACT

1. This case was filed in Pierce County Superior Court in August, 2007. The lawsuit is a Petition for Judicial Review (Land Use Petition Act), Declaratory Judgment action and Complaint for Damages pursuant to ch. 64.40 RCW. This litigation began on August 29, 2007 and was concluded through a summary judgment order entered on June 21, 2013; therefore the litigation lasted five years and 10 months.

2. The litigation involved review of the record and transcript of the Pierce County Hearing Examiner's August, 2007 Decision, various motions to dismiss by the City as well as a motion for summary judgment by the Plaintiffs, a LUPA hearing, a motion for trial setting, the City's motion for summary judgment which was vigorously opposed, objections to evidence filed by the City, reply briefing, and extensive argument on the City's summary judgment motion on May 31, 2013.

3. Plaintiffs raised many arguments and claims for their ch. 64.40 damage claims, and throughout the litigation relied heavily on the cases of *Michael Stanzel v. City of Puyallup,* Pierce County Cause No. 07-2-11228-1, and *City of Puyallup v. Michael Stanzel,* Pierce County Cause No. 08-2-15809-3, as well the appeals arising out of those cases.

4. The City was represented by two attorneys: Michael C. Walter of the law firm of Keating, Bucklin & McCormack, Inc., P.S., a Seattle law firm emphasizing municipal law and land use and water law matters; and by Kevin Yamamoto, Puyallup City Attorney and associated counsel. Due to the nature of the claims – both equitable and legal (damages) – the breadth of the claims and the litigation in this matter, it was appropriate for the City to have both the City Attorney and outside legal counsel representing and

defending the City in this matter. Both attorneys exhibited requisite skill and produced excellent work product throughout the course of this case, ultimately securing summary judgment dismissal of the ch. 64.40 damage claim.

5. On March 29, 2013, the City brought a well-founded Motion for Summary Judgment. The Motion was supported by Declarations of City Attorney Kevin Yamamoto and outside counsel Michael C. Walter. The Plaintiffs vigorously opposed the motion with a "Reply Opposing City's Summary Judgment" and Declarations of Attorney Carolyn Lake, Ted Spice and Ethan Offenbecher submitted on May 20, 2013. The City filed its Reply and also filed an Objection to the Carolyn Lake, Ted Spice and Ethan Offenbecher declarations, and much of the argument in Plaintiffs' response/opposition on May 28, 2013. The Court heard argument on the City's Motion for Summary Judgment on May 31, 2013, granted the City's Motion in full, and Plaintiffs' RCW ch. 64.40 damage claims were dismissed in their entirety. The Court also awarded the City reasonable attorneys' fees and costs pursuant to RCW 64.40.020(2) for their time and expenses defending Plaintiffs' ch. 64.40 damage claims. The Court orally authorized an award of fees and costs at the summary judgment hearing on May 31, 2013.

6. The Plaintiffs and City could not agree on the form or substance of an order granting summary judgment and awarding the attorneys' fees; accordingly, the City filed a Motion for Presentation on June 12, 2013, the Plaintiffs filed a 13-page response with an alternative proposed Order on June 19, 2013, and the City filed a Reply with a modified Order on June 20, 2013. The Court entered an Order on Summary Judgment and Awarding Attorneys' Fees and Costs, in substantially the form proposed by the City on June 21, 2013.

7. The Plaintiffs did not oppose or otherwise respond to the City's request for

attorneys' fees and costs at the summary judgment hearing on May 31 or at the order presentation hearing on June 21.

8. The City timely brought a motion for a determination of reasonable attorneys' fees and costs for defense of Plaintiffs' ch. 64.40 damage claims as well as entry of final judgment on July 1, 2013. The City requested an award of $145,751.11 for both the attorneys' fees and for costs. Of this amount, the City requested $95,341.10 in reasonable attorneys' fees for attorney Michael Walter's time, $48,320.00 for reasonable attorneys' fees for City Attorney Kevin Yamamoto's attorney time, and $2,090.01 in costs. The City's total attorneys' fee and cost request was comprised of the following hours, billing rates and costs incurred:

Michael C. Walter 2007 Fees (@ $205/hr.)	$7,072.50
Michael C. Walter 2008 Fees (@ $213/hr.)	$8,775.60
Michael C. Walter 2009 Fees (@ $225/hr.)	$720.00
Michael C. Walter 2010 Fees (@ $232/hr.)	$533.60
Michael C. Walter 2011 Fees (@ $237/hr.)	$5,190.30
Michael C. Walter 2012 Fees (@ $245/hr.)	$5,953.50
Michael C. Walter 2013 Fees (@ $253/hr.)	$67,095.60
Attorney time for Kevin Yamamoto (@ $200/hr) (2007 to date)	$48,320.00
COSTS:	$2,090.01
TOTAL REQUESTED ATTORNEYS' FEES AND COSTS:	**$145,751.11**

9. The City did not seek compensation for attorneys' fees or costs incurred in exclusively defending the Plaintiffs' non-ch. 64.40 claims, and the City properly segregated its time entries for just those work items related to or necessarily incurred in defense of the

ch. 64.40 damage claims.

10. The billing rates requested for the City's two lawyers were $205 per hour to $253 per hour for attorney Michael C. Walter; and $200 per hour for attorney Kevin J. Yamamoto. The Court finds that attorney Walter's hourly rate over the years ranging from $205 per hour to $253 per hour, as set forth in his Declaration, was reasonable, fair and customary for similar municipal, land use and water rights lawyers in the Puget Sound area. These rates are supported by professional and biographical information as set forth in attorney Walter's Declaration. While attorney Yamamoto has requested an hourly rate of $200, the Court adjusted that hourly rate downward for the years 2007-2012 (the years of this litigation excluding 2013). The Court took the same increments submitted by attorney Walter over the same time span, and applied those increments to attorney Yamamoto's rate in adjusting his $200 per hour requested rate downward beginning in 2012. Accordingly, given this formula, the Court finds and awards attorneys' fee rates for attorney Yamamoto based on these downward adjustments.

11. It was appropriate and reasonable for attorneys Walter and Yamamoto to work cooperatively throughout this litigation, to communicate freely, and to do similar work or review of the others' work product in defending Plaintiffs' ch. 64.40 damage claims. The work by both attorneys was necessary, reasonable and appropriate given the nature of the Plaintiffs' claims, the length of this litigation, the fact that the LUPA and ch. 64.40 claims were inter-related and overlapped, and because of the many unique legal and factual arguments raised by Plaintiffs to support their 64.40 damage claim. The Court found segregating the LUPA claims from the 64.40 claim was a difficult task and at the conclusion of the analysis finds that it is impossible to do so. The Court finds that the legal

theories were all inter-related, particularly the LUPA claim and the 64.40 damages claim. As a result of this overlap there is no practical way to segregate the time on the LUPA claim from time related to the 64.40 claim.

12. The time (attorney hours) spent by attorneys Walter and Yamamoto overall is fair, reasonable, and was necessary to defend and obtain a successful result on Plaintiffs' ch. 64.40 damage claim. The amount of hours expended by attorneys Walter and Yamamoto reflect a comprehensive factual investigation regarding the substance of the Plaintiffs' ch. 64.40 damage claim and the inter-related LUPA claim, over five years of litigating in two forums (before the Hearing Examiner and in Superior Court), substantial research, detailed dispositive briefing, substantial time and effort reviewing the documentation in the files of this case and the Hearing Examiner's decisions, and the records and various trial court hearings and decisions. Additionally, it was appropriate for attorneys Walter and Yamamoto to include, by necessity, their time and effort reviewing the voluminous documentation, factual background and many Hearing Examiner hearings, trial court rulings, and appellate court rulings in the *Michael Stanzel* litigation, which Plaintiffs contended throughout the litigation was important to or otherwise dispositive of the ch. 64.40 damage claims. The time and effort expended by these attorneys also included multiple hearings, efforts by Plaintiffs to secure a trial date, defense by Plaintiffs of the City's summary judgment motion, opposition to entry of the proposed summary judgment Order, and the present motion.

13. The City's attorneys attempted to, and for the most part did, avoid duplicative and unnecessary work, worked together collaboratively to analyze certain issues when necessary. The Court finds, however, that 16 hours of time by attorney Yamamoto was duplicative of attorney Walter's time; therefore, the Court reduces attorney Yamamoto's fees by 16 hours of his time. With the exception of the 16 hours eliminated from attorney Yamamoto's time, the hours expended were reasonable, given the nature of Plaintiffs' claims.

14. Plaintiffs' LUPA and ch. 64.40 damage claims involved a common set of facts; all are based on inter-related legal theories and all arose out of the same land use, utility and annexation condition dispute. Resolution of the LUPA claim, no matter what the ultimate decision, would have an impact on the ch. 64.40 damage claim. *See, City's Motion for Summary Judgment,* pp. 12-16 and 18-22, and City's Summary Judgment *Reply,* pp. 1-5, 8-9, 24-26.

15. The City's attorneys did not include time or costs relating to Plaintiffs' 2006 lawsuit or the subsequent appeals brought by Plaintiffs in that case – except in a few instances where there was an overlap between that 2006 case or Court of Appeals decision and the current (2007) case, or where there were overlaps between the claims in the 2006 and 2007 cases. In those instances, it appears that the attorneys have reduced the time where practicable to reflect the fact that a portion of the time may have been spent regarding the 2006 case. While the attorneys indicate that they may have slightly re-worded some time entries, and consolidated others, they did this for ease of reading and/or to avoid any disclosure of attorney-client privileged, work-protected or otherwise confidential information. To the extent that any billing entries were changed, the attorneys

indicate, and the Court accepts, that they erred on the side of conservatism; that is, if in doubt, they deleted the entry. There is no evidence that either attorney added time that did not appear on original invoices.

16. Attorneys Walter and Yamamoto appropriately included time entries for researching, reviewing documents related to and defending Plaintiffs' LUPA claim. The Court finds because of the overlap between the LUPA claim and the ch. 64.40 damage claim, it is impossible to segregate time on the LUPA claim from other time directly and specifically related to the ch. 64.40 damage claim. To the extent that the attorneys were able to ferret out specific time entries related solely to the LUPA claim which did not relate to or have an impact on the ch. 64.40 damage claim, the Court finds that they did exclude those.

17. Plaintiffs objected to the City's attorneys' fee motion, but did not submit any evidence in response to the motion.

18. This case involved, *inter alia*:

- Five and one-half years of litigation;
- Two respondents/defendants;
- Three claims – two of which involved extensive research, briefing, document review and summary, numerous court hearings or motions, much communication among the city's attorneys and with Pierce County's attorney;
- A number of meetings with client representatives and trips to Puyallup City Hall;
- Extensive document review, including documents pertaining to administrative hearings and other actions going back to 2006;
- Review of many thousands of pages of documents, hearing examiner records and transcripts, briefing, judicial decisions and research from the *Michael Stanzel* litigation (two separate lawsuits, two separate

appeals, multiple remands to the hearing examiner and the trial court, etc.), which Plaintiffs made the gravamen of their ch. 64.40 damage claim and which the City contended was not relevant;

- Defense of unique or unsupported or un-recognized legal theories or claims proffered by Plaintiffs;[2]
- Changing legal theories by Plaintiffs;[3]
- Hundreds of pages of briefing by Plaintiffs since the inception of this lawsuit;
- The City's need to challenge inadmissible evidence or improper argument by Plaintiffs; and
- The need to address repeated compliance issues with civil procedure requirements and local court rules.

19. Based on the foregoing, the Court finds that the attorneys' fees requested by Michael Walter and the law firm of Keating, Bucklin & McCormack, Inc., P.S. in the amount of $95,341.10 are reasonable and should be awarded. Based on the foregoing, I find that the attorneys' fees requested by Kevin Yamamoto, Puyallup City Attorney, in the amount of $48,320.00 should be reduced by 16 hours of time which the Court finds to be duplicative, and a downward rate adjustment for the years 2007-2012 consistent with the rate adjustments by attorney Walter in the same increments. Therefore, the Court finds that an award for attorney Yamamoto's work in the amount of $35,359.54, which includes the reduction of 16 hours of time and a downward rate adjustment for the years 2007-2012 in the same rate increments as attorney Walter, is fair and reasonable. Based on the foregoing, the Court finds that the costs requested by the law firm of Keating, Bucklin & McCormack, Inc.,

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[2] For example, the *Stanzel* case as precedent, collateral estoppel based on the City's prior LUPA motion to dismiss, no need to submit an actual application for water service to trigger ch. 64.40 liability, State Water Law as a basis for recovery under ch. 64.40, etc.

[3] For example, after the city's summary judgment motion, Plaintiffs for the first time contended that they never actually submitted an application for City water service, and that, instead, the City allegedly "obstructed" their efforts to apply.

P.S. in the amount of $2,090.01 are reasonable and should be awarded.

III. CONCLUSIONS OF LAW

(In so far as this order will be dated 15 April 2016 and that in addition to the conclusions of law stated hereinafter, this court also incorporates by this reference the conclusions, authority and analysis contained in Appendix I)

1. Under RCW 64.40.020, the prevailing party is entitled to an award of reasonable attorneys' fees and costs. *See* RCW 64.40.020(2); *See, also, Callfas v. City of Seattle*, 129 Wn. App. 579, 598, 120 P.3d 110 (2005) (fees to the defendant as prevailing party); *Birnbaum v. Pierce County,* 167 Wn. App. 728, 274 P.3d 1070 (2012); (because defendant Pierce County is the prevailing party, it is entitled to reasonable costs and fees) at p. 739; *Manna Funding, LLC v. Kittitas County,* 285 P.3d 1197 (Div. III, 2013); (fees to the defendant as prevailing party); and *Coy v. City of Duvall,* 298 P.3d 134 (Div. III, 2013).

2. On May 31, 2013, the Court granted the City's Motion for Summary Judgment and dismissed this case. At that time, the Court also awarded the City reasonable attorneys' fees and costs under RCW ch. 64.40.020(2). This oral decision was memorialized in the Court's written order entered on June 21, 2013. The City, therefore, was the prevailing party in this action. The City continues to be the prevailing party by virtue of the courts Summary Judgment Order of July 20th 2015.[4]

3. Having previously found that the City is entitled to an award of reasonable attorneys' fees, the Court used a Lodestar analysis to determine the reasonableness of their request. *See, Tribble v. Allstate Property & Casualty Ins. Co.,* 134 Wn. App. 163, 139 P.3d 373 (2006) (directing a commission of the Court to determine the amount of fees and

[4] Pursuant to the analysis contained in Appendix I, the court is granting the same amount of attorney's fees as it did in the order issued following the Summary Judgment Order of May 2013. However it is doing so, based on the Summary Judgment Order of July 20, 2015

expenses to be awarded using a basic Lodestar formula); *Metropolitan Mortgage & Securities Co., Inc. v. Becker,* 64 Wn. App. 626, 825 P.2d 360 (1992) (use Lodestar method to determine reasonable attorneys' fees); and *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."). Under the Lodestar method, the Court multiplies the reasonable hourly rate by the number of hours expended – and this is the "Lodestar" amount. *Metropolitan Mortgage & Securities Co., Inc. v. Becker, supra.*

4. The Court must determine the reasonableness of the hourly rate requested by the City of Puyallup. A reasonable hourly rate is determined by reference to the forum in which the court sits—the Pierce County Superior Court in this case. *See Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997); *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

5. Here, attorney Michael C. Walter's requested attorney billing rates for the time period 2007 to date, vary between $205 per hour to the current billing rate of $253 per hour. Over the five and one-half years of this litigation, his and his firm's hourly billing rate changed slightly to accommodate increased costs, inflation and the Consumer Price Index. From the beginning of this lawsuit (September, 2007) to December 31, 2007, his hourly billing rate was $205 per hour; from January 1, 2008 to December 31, 2008, it was $213 per hour; from January 1, 2009 to December 31, 2009, it was $225 per hour; from January 1, 2010 to December 31, 2010, it was $232 per hour; from January 1, 2011 to December 31, 2011, it was $237 per hour; from January 1, 2012 to December 31, 2012, it was $245 per hour; and, from January 1, 2013 to date, Mr. Walter's hourly billing rate is

$253 per hour. At all times during this litigation, Mr. Walter has been a shareholder (partner) in his law firm, and he is currently a Director in the firm. The Court has reviewed, and is persuaded by, evidence produced by Mr. Walter in his Declaration. Plaintiffs did not submit any evidence contradicting the rates, times or other facts in Mr. Walter's declaration. The Court concludes that his billing rates for the applicable time period (August, 2007 through the current date) are fair, reasonable, consistent with other attorneys with similar experience and expertise handling similar municipal law, land use law, water law and related claims and litigation, and appropriately reflect the factors set forth in the case of *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

6. Mr. Yamamoto, as an in-house City Attorney, is entitled to make an attorneys' fee claim request based on a specific hourly rate, rather than a rate based on salary plus related costs. *See, State v. Weston,* 66 Wn. App. 140, 149, 831 P.2d 771 (1992) (concluding that "the use of a comparable hourly billing rate from an attorney in the private sector was a reasonable basis for the estimate of the value of the [government] attorney time spent on the case"). Attorney Kevin Yamamoto's requested billing rates during the applicable time period (August, 2007 through the current date) of $200 per hour. Plaintiffs did not submit any evidence contradicting the rates, times or other facts in Mr. Yamamoto's declaration. The Court has reviewed Mr. Yamamoto's Declaration in which he requested a $200 per hour billing rate for the applicable time period (August, 2007 through June, 2013). The Court has however, adjusted Mr. Yamamoto's hourly rate downward for the years 2007-2012, using the same increments submitted by attorney Walter, and applying those rates reductions to Mr. Yamamoto's requested $200 per hour rate which the Court applied for his work in 2013. Accordingly, the Court finds that these downward adjusted rates for

attorney Yamamoto are fair, reasonable, and consistent with other attorneys with similar experience and expertise handling similar municipal law, land use law and related claims and litigation, and appropriately reflect the factors set forth in the case of *Kerr v. Screen Extras Guild, Inc., id.*

7. The Court must also determine the reasonable number of hours spent defending Plaintiffs' RCW ch. 64.40 claim. *Tribble v. Allstate Property & Casualty Inc. Co., supra; Metropolitan Mortgage & Securities Co., Inc. v. Becker, supra; Hensley, supra.* The City is not required to provide a minute-by-minute account; rather, the City is only required to establish, through its declarations and billing entries, the general subject matter of their attorneys' time expenditures. *See Hensley*, 461 U.S. at 437 n. 12; *Lytle v. Carl*, 382 F.3d 978, 989 (9th Cir. 2004). The Court must also be careful to segregate out time entries that were wasteful or duplicative.

8. Here, the Court is persuaded that the time entries identified above by attorneys Walter and Yamamoto were fair, reasonable, necessary and directly related to defense of Plaintiffs' ch. 64.40 damage claim, other than 16 hours of attorney Yamamoto's time which the Court found duplicative of attorney Walter's time. Based on the record, the Court concludes that attorneys Walter and. Yamamoto exercised sound billing judgment, and with the exception of 16 hours of attorney Yamamoto's time entries which appeared duplicative of attorney Walter's time entries, the time they spent was reasonable and necessary to secure a successful result for their client (the City). The Court also concludes that the time spent by these attorneys that was exclusive to the defense of Plaintiffs' other claims was appropriately segregated out, consistent with the case law. *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958, 966 (2001) ("the court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact

pattern, but allege different bases for recovery.") (citing *Blair v. Washington State University,* 108 Wn.2d 558, 572, 740 P.2d 1379 (1987)). *See, also, Schwarz v. Sec'y of Health & Human Services*, 73 F.3d 895, 901 (9th Cir. 1995) ("the court must evaluate whether the successful and unsuccessful claims are 'distinctly different claims for relief that are based on different facts and legal theories' or whether they 'involve a common core of facts or [are] based on related legal theories'").

9. The Court also concludes that the time spent by the City's attorneys preparing the present fee Motion is compensable, fair, reasonable and necessary. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799, 807 (1990) ("The general rule is that time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable where the fee shifts to the opponent under fee shifting statutes.") (collecting cases); *In re Wind N' Wave*, 509 F.3d 938, 942 (9th Cir. 2007) ("Along with other circuits, we have granted compensation for litigation over a fee award under fee shifting statutes even when those statutes did not expressly allow for it.").

10. The Court concludes that, with the exception of 16 hours of attorney Yamamoto's time entries which were duplicative of attorney Walter's time entries, the time entries by attorneys Walter and Yamamoto are fair, reasonable and necessarily incurred in defense of Plaintiffs' ch. 64.40 damage claims. The Court concludes that, with the exception of 16 hours of attorney Yamamoto's time entries which were duplicative of attorney Walter's time entries, attorneys Walter and Yamamoto properly segregated their time entries and did not include: (1) time entries that were directed exclusively toward the Plaintiffs' non-64.40 claims; (2) time entries that appeared redundant or potentially redundant; (3) time entries that did not appear necessary to defending Plaintiff's ch. 64.40

damages claims; (4) time entries for one of Mr. Walter's former partners, Mr. Rand Ebberson, who initially did some work on the case; and (5) time or fees by former City Attorneys Gary McLean and Cheryl Carlson.

11. All of the claims in this case involved a common set of facts, and were based on inter-related legal theories. Plaintiffs' LUPA claims and the ch. 64.40 damage claims were inextricably tied together, involved a common nucleus of facts and were directly related; therefore resolution of the LUPA claim no matter what would have had an impact on the ch. 64.40 damage claim. *See, City's Motion for Summary Judgment,* pp. 12-16 and 18-22, and the City's Summary Judgment *Reply,* pp. 1-5, 8-9, 24-26. Denial of the LUPA claim would necessarily preclude Plaintiffs' ch. 64.40 damage claim. *See, id.*

12. The Court concludes that the total fee award set forth below (in the total amount of $132,790.65) is fair and appropriate for the reasons set forth in the preceding findings of facts and because: the case involved much attorney time and work; the litigation spanned five and one-half years; the matter was aggressively prosecuted by the Plaintiffs over the approximately five and one-half year period; the Plaintiffs left no issue unaddressed in their strategy; that for every issue raised by the Plaintiffs, and every brief filed, and every motion noted, there necessarily must be a response from the City; and due to the thorough preparation and zealous advocacy of the Plaintiffs, this case resulted in numerous hours of responsive preparation by the defense (the City), in which the City ultimately prevailed.

13. In total, the Court concludes that the Defendant City of Puyallup is entitled to a total award of **$132,790.65** as against Ted Spice, Plexus Development LLC, and Plexus Investments LLC, jointly and severally, in both reasonable attorneys' fees and compensable

costs in defending Plaintiffs' ch. 64.40 damage claim. This award is comprised of $95,341.10 in reasonable attorneys' fees for Michael C. Walter, $35,359.54 in reasonable attorneys' fees for Kevin J. Yamamoto, and $2,090.01 in costs. This award is not made against or applicable to Doris Mathews, who died on December 8, 2013.

IV. ORDER RE: ATTORNEYS' FEES AND COSTS

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant City of Puyallup is entitled to a total award of **$132,790.65** in reasonable attorneys' fees and costs against Plaintiffs (1) Ted Spice, (2) Plexus Development, LLC, and (3) Plexus Investments, LLC, jointly and severally.

V. FINAL JUDGMENT

Final judgment shall be entered in favor of the Defendant City of Puyallup and against Plaintiffs Ted Spice, Plexus Development LLC and Plexus Investments LLC, jointly and severally, in the amount of **$132,790.65**.

DATED this 15 day of April, 2016.

HONORABLE JACK F. NEVIN
Judge

FILED
DEPT. 6
IN OPEN COURT
APR 15 2016
Pierce County, Clerk
By _____
DEPUTY

Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX J

APPENDIX J

THE HONORABLE JACK F. NEVIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE AND PLEXUS DEVELOPMENT, LLC, and DORIS E. MATHEWS Petitioners, v. PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 07-2-11635-0 **SUPPLEMENTAL ORDER CORRECTING ORDER OF APRIL 15, 2016 GRANTING CITY OF PUYALLUP AN AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS PURSUANT TO RCW CH. 64.40** [Clerk's action required]

THIS MATTER came before the Court on Respondent/Defendant City of Puyallup's *Motion for Determination of Attorneys' Fees and Costs* dated July 1, 2013. On April 15, 2016 this Court granted that motion. Subsequent review of the Court's order reflects two typographical errors.

After reviewing the Order of April 15, 2016, this Court orders the following corrections of typographical errors:

Line 7 page 2 should read "not" Doris Mathews (versus "note" Doris Mathews).

Line 4 page 18 should read December 8, "2009" (versus 2013).

All other provisions of the Order of April 15, 2016 shall remain in full force and effect.

DATED this 20 day of May, 2016.

Jack Nevin
JUDGE JACK NEVIN

FILED
DEPT. 6
IN OPEN COURT
MAY 20 2016
Pierce County, Clerk
By
DEPUTY

Ted Spice, et. al., Appellants v. Pierce County and City of Puyallup
Case No.: 45476-9-II

Brief of Respondent City of Puyallup

APPENDIX K

APPENDIX K

THE HONORABLE JACK F. NEVIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE AND PLEXUS DEVELOPMENT, LLC, and DORIS E. MATHEWS Petitioners/Plaintiffs, v. PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation, Respondents/Defendants.	No. 07-2-11635-0 **FINAL JUDGMENT ON CR-11 SANCTION AWARD** (Clerk's Action Required)

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the clerk's Execution Docket:

1.	Judgment Creditor:	City of Puyallup, a municipal Corporation
2.	Attorneys for Judgment Creditor:	Kevin Yamamoto, City Manager City of Puyallup 333 S. Meridian Puyallup, WA 98371 Joe Beck, City Attorney City of Puyallup 333 S. Meridian Puyallup, WA 98371

		Michael C. Walter Keating, Bucklin & McCormack, Inc., P.S. 800 Fifth Avenue, Suite 4141 Seattle, WA 98104
3.	Judgment Debtors:	1) Carolyn A. Lake
4.	Attorneys for Judgment Debtors:	Carolyn A. Lake Goodstein Law Group, PLLC 501 South "G" Street Tacoma, WA 98405
5.	Date of Entry of Judgment:	~~April~~ May 20, 2016
6.	Principal Judgment Amount:	$ 45,000
7.	Judgment shall bear interest at 12% per annum.	
8.	Total Judgment Award:	$ 45,000

DATED this 20 day of ~~April~~ May, 2016.

Jack Nevin

THE HONORABLE JACK F. NEVIN

FILED
DEPT. 6
IN OPEN COURT
MAY 20 2016
Pierce County, Clerk
By _____
DEPUTY

THE HONORABLE JACK F. NEVIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TED SPICE AND PLEXUS DEVELOPMENT, LLC, and DORIS E. MATHEWS Petitioners, v. PIERCE COUNTY, a political subdivision, and CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 07-2-11635-0 **FINAL JUDGMENT ON RCW CH. 64.40 AWARD** (Clerk's Action Required)

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the clerk's Execution Docket:

1. Judgment Creditor: City of Puyallup, a municipal Corporation

2. Attorneys for Judgment Creditor: Kevin Yamamoto, City Manager
City of Puyallup
333 S. Meridian
Puyallup, WA 98371

Joe Beck, City Attorney
City of Puyallup
333 S. Meridian
Puyallup, WA 98371

5/23/2016 12:30 0286

		Michael C. Walter Keating, Bucklin & McCormack, Inc., P.S. 800 Fifth Avenue, Suite 4141 Seattle, WA 98104
3.	Judgment Debtors:	Ted Spice Plexus Development, LLC Plexus Investments, LLC *Judgment entered jointly and severally*
4.	Attorneys for Judgment Debtors:	Carolyn A. Lake Goodstein Law Group, PLLC 501 South "G" Street Tacoma, WA 98405
5.	Date of Entry of Judgment:	May 20, 2016
6.	Principal Judgment Amount:	$132,790.65
7.	Judgment shall bear interest at 12% per annum.	
8.	Total Judgment Award:	$132,790.65

DATED this 20 day of ~~April,~~ May 2016.

Jack Nevin
THE HONORABLE JACK F. NEVIN

FILED
DEPT. 6
IN OPEN COURT
MAY 20 2016
Pierce County, Clerk
By _____
DEPUTY